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A

PRACTICAL TREATISE

FOR

LAWYERS AND LAYMEN.

With an Appendix

OF

PEERAGE CHARTERS AND LETTERS PATENT.

(*In English.*)

BY

FRANCIS BEAUFORT PALMER,

BENCHER OF THE INNER TEMPLE;

Author of "*Company Precedents*," &c.

LONDON:

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PREFACE.

PEERAGE law in England possesses a wide and enduring interest. It appeals alike to the lawyer and the statesman, to the student of history and to the antiquarian. It appeals, on personal grounds, to those who are descended (and their number is legion) from ennobled ancestors; and last, not least, it appeals to those who possess or hope to inherit or recover an existing peerage.

Yet, attractive as the topic is, it is almost a century now since the last work on the subject (*Cruise on Dignities*) was given to the public—though during that long interval the important and voluminous Reports of the Committee of the House of Lords on “The Dignity of a Peer” have been published, and a whole series of peerage cases in the House of Lords have illuminated the dark places of the law and established points of the highest importance, with far-reaching consequences.

The present Work was planned and partly written more than twenty years ago, but its progress has been greatly retarded and at times suspended by the constant pressure of other work.

In order to bring the Work within the limits prescribed, it has been necessary to omit a large proportion of the interesting and relevant matter collected.

The Author has sought to show how Peerage Law in England now stands, and—so far as material—how it has stood from time to time during the last eight centuries.

He trusts that the Book may be found practically useful; to render it such has been his aim throughout.

Cordial thanks are tendered by the Author to his friend Mr. EDWARD MANSON, of the Chancery Bar, for his kind assistance in preparing the Work for, and passing it through, the press.

F. B. P.

5, NEW SQUARE,
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June, 1907.

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“ Rot. Parl.” refers to the printed Rolls of Parliament.

“ Inst.” refers to Coke’s Institutes.

“ Collins ” and “ Collins’ Claims ” refers to Collins’ Precedents, see *infra*, p. 26.

“ Redesdale Committee ” refers to Committee of the Lords mentioned *infra*, p. 26, and their Reports.

“ R. C.” refers to same Committee, and

“ R. C. V.” refers to Vol. V. of their Reports.

“ May ” refers to May’s Parliamentary Practices.

PEERAGE LAW IN ENGLAND.

CHAPTER I.

DERIVATION AND NATURE OF PEERAGES.

27 It is a constitutional maxim that the King is the fountain of honour, and it is from this fountain that the dignity of peerage is derived. This origin has been constantly recognized from very early times, not only in patents and charters of nobility, but in Parliament, in the Courts of law, and by all writers of authority. The fountain of honour and dignity whence peerages are derived.

Thus Coke, in his *Institutes*, Part IV. p. 363, says that by the laws of England all the degrees of nobility and honour are derived from the King as the fountain of honour.

In *Prince's Case* (8 Co. Rep. 1, 18), where the Dukedom of Cornwall was in question, it was laid down that "the King is the fountain of all honour and dignity," and the language of Chief Baron Comyns in his well-known *Digest* is to the same effect, "that the King by his prerogative is the fountain of all dignity and honour in the realm."

The Redesdale Committee, in their third Report, at p. 37, treat the matter as well settled. They say, "that it has been constantly and invariably asserted as a rule of law that the King is the fountain of all dignity and honour in the kingdom; and that he may not only give the ancient distinctions of Earl or Baron to any one, but may also erect any name of dignity which was not used before, a right which appears to have been exercised by the Crown in the erection of a mere name of dignity, to which rights of precedence only have been annexed, as the title of Baronet, and also in the erection of names of dignity (those of Duke, Marquis, and Viscount) which have been annexed to the dignity of peer of the realm with different rights of precedence. The actual exercise of this power in various instances during the course of ages, and the constant assertion of the right in various patents of the Crown under which many dignities have been and many still are enjoyed, seem to demonstrate that the Crown has

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long been and probably has always been considered as the fountain of all dignity and honour in the United Kingdom."

And this fountain of honour, be it noted, is one that is inexhaustible. "In granting a peerage," said Lord Brougham in the *Devon Case* (Nicholas Report, at p. 164), "the Crown is not dealing with an estate which actually existed and of which it had the reversion. The bounty of the Crown in the very act of giving calls into existence the thing granted; it is a creation rather than a transference. The Crown is indeed the fountain of honour, but it is a fountain wholly inexhaustible; it is a fountain from which honours may be drawn again and again, and yet as much will still be left and as much more still be made to flow as if nothing had issued."

And as with the creation of the dignity so with the extent of it. It rests with the Crown to determine what shall be the degree of honour attaching to any peerage it bestows, and what—within the limits that the law permits—shall be the course of its devolution.

But after
creation
Crown's
control ceases.

But once having brought a peerage into existence, the Crown's control of it is in a measure exhausted. The created peerage becomes an inheritance descending according to the settled rules of law, and no act of the Crown can either alter the course of its descent (save where it falls into abeyance), or merge or extinguish it by the grant of a peerage of higher degree to the same person, or change its precedence, or give effect to a surrender of it, or restore it if forfeited. For a peerage once created endures until it is destroyed or extinguished, either by attainder or by special Act of Parliament, or by failure of inheritable heirs—of heirs, that is to say, within the original limitations.

No alienation
or surrender
possible.

"It is one of the brightest privileges of our order," said Lord Erskine, in the *Banbury Case*, "that we transmit to our descendants a title to the honours we have inherited or earned which is incapable either of alienation or surrender." (See Marchant's Report of *Gardner Case*, p. 464.)

No bar by
non-claim.

Non-claim, even for centuries, will not bar the title to a peerage, for questions of peerage are not fettered by the rules of law that govern the limitation of actions. (*Ibid.* See further, Chap. XIII.)

Of the Degrees of the Peerage.

Degrees of
peerage.

There are at the present day five degrees of peerage, Duke, Marquis, Earl, Viscount, Baron, but for nearly three hundred years—from the time of the Conqueror to the reign of Edward III.—there were only two, Earls and Barons. A few words may be said on each of these degrees, taking them not in their historical order of introduction, but their order of precedence.

1. **Duke.**—Although William the Conqueror and his immediate Duke. successors were Dukes of Normandy, the title of Duke was not given to any subject until the reign of Edward III., when his son, the Black Prince, was in 1337 created Duke of Cornwall. Shortly afterwards, in 1351, the title of Duke of Lancaster was conferred on Henry Plantagenet.

2. **Marquis.**—This degree was first introduced into the peerage Marquis. in 1385, when Richard II. created Robert de Vere, Earl of Oxford, Marquis of Dublin for life, and assigned him his seat in Parliament below the Dukes and above the Earls. The next instance is that of John de Beaufort, Earl of Somerset, created by Edward III. Marquis of Dorset in 1397. (V. 117.) He was deprived of the title in 1 Hen. IV., and when in 1402 the Commons prayed the King in Parliament for restoration of the honour, the Earl, whilst thanking the Lords and Commons for their goodwill, humbly begged the King not to restore the title, as "*le nome de Marquys feust estraunge nome en cest Roialme.*" (Rot. Parl. 4 Hen. IV. Vol. 3, p. 488.)

3. **Earl.**—This degree was known in Norman days as a Comitatus, Earl. and the holder as a Comes, or Count, but in course of time the old titles of "Earl" and "earldom," which had been in use among the Saxons long before the Conquest, superseded the foreign terms "Count" and "county."

The earliest known charter of an Earl was that granted to Geoffrey de Mandeville by the Empress Maud, in the time of King Stephen, and by that charter Maud granted the earldom to him and his heirs after him hereditarily, in these terms:—"Ego Matilda filia Regis Henrici et Anglorum domina do et concedo Gaufredo de Magnavilla pro servitio suo et heredibus suis post eum hereditabiliter ut sit Comes de Essexia et habeat tertium denarium vicecomitatus de placitis sicut Comes habere debet in Comitatu suo," &c. (Selden's Titles of Honour, 2nd ed. p. 647.)

4. **Viscount.**—This dignity, ranking between that of Earl and Baron, Viscount. was first introduced into England by Henry VI., who created John, Lord Beaumont, Viscount de Beaumont in 1440. (Rot. Parl. 18 Hen. VI. p. 2, m. 21. See Redesdale Committee, Vol. 5, p. 235.)

5. **Baron.**—This degree is the most ancient of the degrees of Baron. peerage; it dates from the Conquest. The barony of De Ros, created 1264, at present stands first.

Of the Classes of Peerages.

Classes.	Peerages may also be classified in respect of their kingdom of origin thus:—
Peerages of England.	1. Peerages of England created before the union with Scotland, 1st May, 1707. Such peerages, where now subsisting, are become peerages of the United Kingdom of Great Britain and Ireland.
Peerages of Great Britain.	2. Peerages of Great Britain created after that union aforesaid. Such peerages, where now subsisting, are become peerages of the United Kingdom of Great Britain and Ireland.
Peerages of United Kingdom.	3. Peerages of the United Kingdom of Great Britain and Ireland created since the union with Ireland, 2nd July, 1800. Besides these there are:—
Peerages of Scotland.	4. Peerages of the kingdom of Scotland created before the union with England. Such peerages give the right to sit by representation only in the House of Lords and for life. (See Chap. XIV., <i>infra</i> .)
Peerages of Ireland.	5. Peerages of the kingdom of Ireland, whether created before the union with Great Britain or since. Such peerages give the right to sit by representation only in the House of Lords. (See Chap. XIV., <i>infra</i> .)

Of the Qualities of Peerage.

Peerage an hereditament. A peerage is, in law, an incorporeal hereditament, an inheritance. The point arose in *Nevill's Case* (1605, 8 Co. 33), and all the judges were of opinion that a peerage was an hereditament, and therefore within the statute 26 Hen. VIII. c. 13, forfeiting hereditaments for treason. "There be some," says Lord Coke (1 Inst. 16 a), "that have an inheritance and have it neither by descent nor properly by purchase, but by creation, as when the King doth create any man a Duke, Marquis, Earl, Viscount, or Baron to him and his heirs, or to the heirs male of his body, &c., for he hath an inheritance therein by creation."

There is abundant authority on this point. In the *Grey de Ruthyn Case* (1640, Collins' Claims, p. 244), Brampston, C. J., in delivering the opinion of the judges to the House of Lords, referred repeatedly to a peerage as an hereditament.

Blackstone, also (Book II. cap. 3), describes dignities as "a species of incorporeal hereditament, wherein a man may have a property or estate."

Again, in the *Beaumont Case* (Cruise, pp. 214, 215), the judges having been consulted by the House of Lords, Eyre, C. J., in delivering the opinion of the judges, 25th June, 1795, laid down the proposition

that "a peerage is the most transcendent honour and dignity, but it is still, in the eye of the law, an inheritance."

The Redesdale Committee, dealing with this point in their third Report, p. 47, say: "A peerage being a hereditament created *de novo*, it can have no existence but according to the terms of its creation, and must cease to exist the moment there should be a failure of those to whom it may be given by the words of patent."

Again, in their fourth Report, p. 265, the Committee say, in reference to the grant of a peerage in tail: "The dignity of peerage so granted is an incorporeal hereditament, having no existence before its creation by act of the Crown, and having existence therefore only by force of its creation and from the time of its creation, and having continuance only according to the terms of its creation, and then ceases to exist as if it had never been."

The most recent authority is that of *Countess Cowley v. Earl Cowley* (1901, A. C. 450), where the Lord Chancellor (Halsbury) and the other lords who took part in the case all referred to the peerage (an earldom) under discussion as "an incorporeal hereditament vested in the Earl." (See further, *infra*, p. 15.)

A Peerage is Real Property.

All dignities or titles of honour, says Cruise (cap. 4, sect. 1), having been originally annexed to lands, were considered tenements or incorporeal hereditaments, wherein a person might have a real estate. And although dignities are now become little more than personal honours and rights, yet they are still classed under the head of "real property" (p. 98). This principle was recognized in the House of Lords in the *Buckhurst Peerage Case* (1876, 2 App. Cas. 1), where Lord Cairns, in addressing the peers, said: "I also will remind your lordships, without referring at any length to authorities upon the subject, that with regard to peerages it is the well-established and constitutional law of the country that a peerage *partaking of the qualities of real estate* must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law." A peerage is real property.

It was on this ground—of a peerage partaking of the qualities of real estate—that the House of Lords, in consulting the judges in regard to peerage cases, was in the habit of putting to them questions in regard to what would be the law with reference to land in a case analogous to that under discussion.

A Peerage is a Tenement.

A peerage a
tenement.

The word "tenement" in its vulgar acceptation is, as Blackstone observes, "only applied to houses and other buildings, yet in its original, proper, and legal sense it signifies everything that may be holden, provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial ideal kind. Thus *liberum tenementum*, *frank tenement* or *freehold* is applicable not only to lands and other like objects, but also to offices, rents, commons and the like, and as lands and houses are tenements so is an advowson a tenement; a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind are all of them, legally speaking, tenements."

Hence, as the Redesdale Committee in their first Report point out, "a dignity granted in terms which will convey the dignity to descendants of the person to whom it is first granted is in that person and his descendants to whom it may be limited a *tenement*, inasmuch as it is capable of being holden." And the same Committee in their third Report (at p. 222), referring to a peerage created by patent, say: "The dignity of Baron so created by patent was a *tenement* in gross (see *infra*, p 196), dependent on nothing but the terms of the patent by which it was created." (See further, Chap. VII., *infra*.)

Of the Ennobling Property of a Peerage.

A peerage
confers
nobility.

A peerage confers nobility on the holder for the time being. It is a trite saying that the grant of a peerage ennobles the blood of the grantee; and this metaphorical expression is in a sense correct, for the grant of a peerage to a commoner renders him or her noble, since it makes him or her a peer or peeress, and gives to his or her issue—or such of them as by the grant shall be made inheritable—a potential nobility.

But clearly, in point of law, the only nobles in England are the peers and peeresses. "The true division," says Lord Coke (Inst. I. 16 b), "of persons is that every man is either of nobility, that is, a lord of Parliament of the Upper House, or under the degree of nobility, among the commons."

Nobility is inherent in the blood in that a peerage cannot be aliened, or surrendered, or merged, but it is not inherent in the sense that it passes with the blood to all descendants of the grantee.

The children of a peer, then, are not born noble. If the parent's peerage is descendible to heirs general each descendant may by possibility inherit the same and so acquire nobility. So where a peerage is granted to a man and the heirs male of his body, he is

ennobled, but they have only the prospect of nobility, which may or may not be realised. Even the only or eldest son and heir apparent of a peer is not during his father's lifetime a noble, unless indeed he acquires a peerage by creation, or by descent from or through his mother.

On the other hand, where a peer marries a commoner she thereupon becomes a peeress and therefore noble. She is entitled to the privileges of peerage other than the right to be summoned to and sit in Parliament, and she remains noble notwithstanding the death of her husband; but if during her widowhood she marries a commoner, then she ceases to be a peeress and noble. Peerage by marriage.

A peeress in her own right who is married to a commoner still retains her nobility—still remains a peeress—but does not impart her nobility to her husband. (Co. Litt. 16 b, and see further, *infra*, Chap. X.)

Of Rights and Privileges incident to a Peerage.

There are various rights and privileges incident to a peerage, including the right to a summons to Parliament as a temporal lord, the right to trial by peers. These are dealt with in Chap. IV., *infra*. Rights incident to peerages.

Peerage: Meanings of Term.

It may be well here to point out that the term "peerage" is used in several senses. "First," as Mr. Justice Crowder said in the *Fermoy Peerage Case* (5 H. L. C. 741, 1856), "a peerage may mean any degree of nobility, as an earldom, a barony, or the like. This is probably its most usual signification in common parlance. . . . Meaning of peerage.

" . . . A second meaning of the word 'peerage' may be where two or more dignities of nobility are vested in the same peer with different lines of succession. . . .

" . . . But there is a third sense in which a peerage is used as comprehending all the dignities of nobility held by a peer, and constituting the status of an individual peer, whether consisting of one or more dignities, and whether, if more than one descendible, similarly or differently. He is a peer by holding any one of those dignities, and is entitled thereby to all the rights and privileges of a peer. By holding several dignities he is not more a peer, or thereby entitled to any greater or other rights or privileges of a peer; although his rank among the peers will vary according to his titles. . . .

" . . . All the dignities of nobility, therefore, of each peer constitute his status of a peer, his peerdom or peerage. In this sense no peer can have more than one peerage."

And Baron Alderson, in the same case, said:—"It is a mere popular phrase to say that a barony is a peerage. The correct phrase is that the possessor of a barony is a peer, or that the possession of a barony confers a peerage. No man can have two peerages, if we speak accurately. He may have a barony and an earldom, but he can only have one status of peerage, for (equality admitting of no degrees) peerage is in its very nature one and indivisible."

"The peers of the realm," says Coke, *Inst. I.* 156 b, "are divided into barons, viscounts, earls, marquises, and dukes. . . . And in judgment of law any of the said degrees of nobility are peers to another, as if an earl, marquis, or duke be tried for treason or felony a baron or other degree of nobility is his peer."

The term "the peerage" is commonly used to describe the whole body of the peers.

In this work the term "peerage" is generally used in its primary and popular sense as denoting a hereditament which confers peerage rights.

CHAPTER II.

THE JURISDICTION IN PEERAGE MATTERS.

As the Crown is the fountain of honour, so, in a sense, is it the fountain of justice (see Blackstone, Vol. I., p. 257), and accordingly in peerage matters it rests with the Crown to dispense justice to whom it is due. It is the Crown from whom in the first instance the claimant to a peerage seeks relief by petition, and the now settled usage is for the Crown, on the report of the Attorney-General, to refer the matter to the House of Lords, which, in its turn, refers the claim to its Committee for Privileges. The Crown's jurisdiction.

"Whoever," say the Redesdale Committee in their third Report, p. 52, "has claimed a dignity has sued for it to the Crown by petition, which is in the nature of a petition of right, now commonly referred by the King to the House of Lords for the advice of the House what ought in justice to be done upon the petition."

There is abundance of authority as to the proper mode of proceeding on peerage claims.

Thus, in 11 Hen. VI., 1433 (see Rot. Parl., Vol. V., p. 441, and R. C. V. 227), it appears that a petition was presented to the King in Parliament by John Fitzalan Lord Maltravers, calling himself Earl of Arundel, and praying to be given his place, as well in Parliament as in the King's Council, as Earl of Arundel. A counter petition was presented by the Duke of Norfolk, then a minor, and in the custody of the King. The title of the claimant was examined, and according to the Parliament Rolls, it appears that upon reading the title of John Earl of Arundel, and consulting the judges and others learned in the law, and the rest of the King's Counsel, the King, by the advice and consent of prelates, dukes, earls and barons in the then Parliament, granted the prayer of the petition with a *salvo jure*. (See first Report of Redesdale Committee, p. 426.) Arundel Claim.

In the great controversy between John Earl Marshall and the Earl of Warwick, in the time of Henry VI., the proceeding was commenced before the King in Parliament. (See Redesdale Committee, Vol. V., p. 198; Rot. Parl. 3 Hen. VI.) Earl Marshall v. Warwick, temp. Hen. VI.

Again, in 27 Hen. VI., 1449, R. C. V. 269, it appears from the Parliament Rolls that a contest arose between the Earl of Arundel Arundel v. Devonshire, temp. Hen. VI.

and the Earl of Devonshire in the presence of the King in Parliament as to the precedence of the said Earls respectively, as well in Parliament as elsewhere, and that the matter was, by the advice of the lords spiritual and temporal, submitted to certain lords of the same Parliament to examine and decide, and that these lords had not had time to deal with the matter, and therefore that the King, with the like advice, had directed that the judges of the law of the land, being in the same Parliament, should hear, see and examine the said matters, and should report to the King and to the lords, and that the judges, having heard the matters and seen the parties, declared that they conceived that it was a matter of Parliament belonging to the King's Highness and to the lords spiritual and temporal in Parliament by them to be decided and determined . . . and it belongeth to be determined by the King and his lords, and not in any other way; wherefore the King, by the advice and with the consent of the lords spiritual and temporal being in the same present Parliament, determined and decreed the matter.

*Willoughby
Claim,
temp. Eliz.*

A hundred years later, in the time of Queen Elizabeth, Mr. Bertie claimed the Barony of Willoughby by the courtesy of England, and the claim was referred by the Queen to Lord Burleigh and to other Commissioners, as also a claim to the same dignity by Peregrine Bertie, the son of the claimant. The Commissioners made their report in favour of the son, who was accordingly summoned. (See Collins' Claims, p. 1.)

*De la Warr,
temp. Eliz.*

Again, in 39 Eliz., Thomas Lord De la Warr petitioned the Queen in regard to his precedence in Parliament. This petition was referred to the House of Lords, and by the House to a Committee, who called to their assistance the two chief justices and other judges. The Committee made their report to the House, and the claimant was allowed the precedence he claimed. (11 Coke Rep. p. 1; Redesdale Committee, 3rd Rep. 32.)

*Subsequent
practice.*

The forms of procedure adopted in the above-mentioned claims has been followed in a great number of subsequent peerage cases, and in almost all the Crown, where any doubt as to the validity of the claim has arisen, has taken the course of referring the matter to the House of Lords for its opinion and advice. This is the more desirable, as the decision of questions of peerage law involve such serious consequences, and a decision by the Crown without the approval of the lords is not conclusive.

Should the Crown, for example, dispensing with the reference, make a material mistake of law or fact, and acting on that mistake issue a writ to the claimant and recognize him as the holder of a peerage which is not in truth vested in him, this recognition will not confer on the claimant a title to the peerage in question. It may have the

effect of conferring upon him a new peerage by virtue of his being summoned to and sitting in Parliament, but it cannot divest the title of the true owner.

As to the Jurisdiction of the House of Lords.

The petition presented by a claimant to a peerage being referred by the Crown to the lords, it is for the lords, acting in the jurisdiction thus delegated to them by the Crown's reference, to examine the claimant's case, and to advise the Crown accordingly. House of Lords' jurisdiction.

For this purpose the House refers the claim to a Committee for Privileges to report thereon, and on its doing so by resolution of the whole House adopts, if it thinks fit, the report of the Committee. In such cases the resolution of the House is not in the nature of a judgment, and yet it is something more than mere advice. The Crown is not bound to act on the advice of the lords, but if the Crown does act on the advice of the lords that concludes the matter. (See *infra*, p. 21.)

Lord Cottenham, L. C., in *Earl of Waterford's Claim* (6 Cl. & Fin. 149, 1832), said: "It is impossible to deny that there is a considerable difference between an entry in the Journals" [in relation to an uncontested matter] ". . . and what is, strictly speaking, a judicial decision in *foro contentioso* upon a claim first presented to the Crown, then referred for the advice of the law officers of the Crown, and then to the House of Lords, and by that House—according to the usual course of its proceedings—referred to the Committee of Privileges, followed by a report made, not alone by that Committee, but also sanctioned by a resolution of the whole House, and upon that resolution, to make the decision more complete, a writ issuing and the party sitting under it. This is the most perfect form of judicial determination in favour of a peerage." (See further, *infra*, p. 227.) Conclusiveness of decision in favour of a claimant.

The jurisdiction of the House of Lords is not confined to cases in which a peerage claim is referred to the House by the Crown. The Lords' inherent jurisdiction.

The House of Lords has an inherent jurisdiction, as guardian of its own privileges, to determine who are its members and what is their precedence *inter se*; and inasmuch as this precedence depends on ancientry, what is their ancientry, and from time to time to declare the law generally in regard to peerage law and rights.

This privilege of declaring for itself what the law is upon the subject of its own constitution and practice belongs to each House of Parliament, and the Lords' jurisdiction in the matter is certainly not less extensive than that of the Commons.

House of Commons' jurisdiction as to peers voting for membership thereto.

The Commons' power is fully recognised in *Beauchamp (Earl) v. Overseers of Madresfield* (8 C. P. 245, 1872). There the question arose whether a member of the Upper House could vote on the election of members to the Lower House. Repeated resolutions of the Commons, declaring that no peer hath any right to vote, were shown to have been passed, and it was decided that they, in effect, declared the law. "These resolutions," said Bovill, C. J., "were passed, not for the purpose of determining who should in future be allowed to vote, but for the purpose of declaring what was the law upon the subject. The House of Commons alone could not, without the assent of the other branch of the Legislature, make a law to determine its own constitution; but it was competent to the House sitting as a Court, as it no doubt was, to determine as to the right of voting, and they were bound to declare the law."

Declarations of law by that House.

The House of Lords has on several occasions exercised an analogous jurisdiction, and in doing so it is important to observe that the House is not making but declaring the law as to its own constitution and privileges.

Grey de Ruthyn Case, 1640.

Thus, in resolving in 1640 (see the *Grey de Ruthyn Case*, Collins, p. 256), that no peer could drown or extinguish his honour, the House was declaring what the law always had been; not laying down a new rule for the future. (See *infra*, p. 160.)

Banbury Case, 1660.

On the 13th July, 1660, a motion, as appears from the Journals of the House, was made: "That there being a person that now sits in this House as a peer who as is conceived hath no title to be a peer, *videlicet* the Earl of Banbury, it is ordered that this business shall be heard by counsel at the bar Monday come seven-night."

Worcester Case, 1660.

On the 18th August, 1660, it appears from the Journals that "Upon information to the house by the Marquis of Hertford, that a patent is granted to the Marquis of Worcester which is a prejudice to other peers. It is ordered that the consideration of the said patent is referred to the consideration of these lords following." Then follows a list of twenty-nine peers with power to send for persons and "the patent." On the 20th August, the Lord Chief Baron and the Attorney-General were ordered to attend to advise "the Lords' Committees in point of law concerning the Marquis of Worcester's patent." The patent was to create the Marquis of Worcester to be "Duke of Somerset on certain conditions on his part to be performed which he hath not performed." Other proceedings were taken, and on the 3rd of September the Marquis "delivered up the patent to his Majesty for the dukedom of Somerset."

Purbeck Case, 1661.

The Journals of 25th November, 1661, show that it appearing that the name of Viscount Purbeck was not in the list of the names of the Lords by which the House was called that day, it was ordered that it

be referred to a Committee for Privileges to consider whether he be to sit in this House as a peer or not.

On the 16th March, 1694, the Journals show that "after hearing the Attorney-General in relation to barons by descent whose ancestors were called by writ, as also counsel in behalf of several peers in this House who think themselves concerned therein," consideration of the matter was adjourned. On further debate on the 19th March, 1694, this question was put: "Whether if a person summoned to Parliament by writ, and sitting, die, leaving issue two or more daughters who all die, one of them only leaving issue, such issue has a right to demand a summons to Parliament?" and it was resolved in the affirmative, Lords Grey and Culpeper dissentient. A protest was afterwards entered against the resolution signed by the Duke of Norfolk and other lords.

*Emerger from
abeyance,
1694.*

The Journals of the 12th November, 1694, show that on that day an order was made to refer it to the Committee for Privileges to consider "whether if a lord called by writ into his father's barony shall happen to die in the lifetime of his father, the son of that lord (so called) be a peer and hath right to demand his writ of summons?" The Lords reported that "they find no precedent in this case," and a debate arising on this report so far as it was applicable to the case of "Charles, Lord Clifford (son and heir of Charles, Lord Clifford of Launsburgh, who was called by writ to Parliament in the lifetime of his father, the present Earl of Burlington)," the House decided that he was entitled to a writ of summons as Lord Clifford of Launsburgh.

*Clifford Case,
1694.*

The Journals show that on the 12th December, 1711, "notice being taken 'that in the list of nobility delivered by Garter King-at-Arms, there is inserted James Hamilton, Duke of Hamilton and Brandon, amongst the dukes,' and the House being informed that a patent is lately passed the Great Seal for creating the said Duke of Hamilton Duke of Brandon," it was "Ordered that on the 20th instant this House will take the patent into consideration," and that "the Privy Seal Bill of the patent be laid before this House." The judges were ordered to attend. The Duke of Hamilton was heard by counsel, and the Privy Seal Bill of the patent and enrolment were read. After several questions proposed the following was resolved in the affirmative: "That no patent of honour granted to any peer of Great Britain who was a peer of Scotland at the time of the Union can entitle such peer to sit and vote in Parliament or to sit upon the trial of peers." A protest was entered against this decision, signed by several lords.

*Scotch peer
granted
British
peerage,
1711.*

On the 14th June, 1781, a petition of Douglas Duke of Hamilton and Brandon, praying for a writ of summons as such in virtue of the creation by Queen Anne, was presented to his Majesty, and together with the Attorney-General's report thereon, was by his Majesty

*Hamilton Case,
1781.*

referred to the House. A Committee for Privileges sat on the 6th June, 1782; the judges attended; and after counsel for the claimant and for the Crown had been heard, the question was put to the judges, "Whether by the 23rd article of the Act of Union, which declares all peers of Scotland to be peers of Great Britain, with all the privileges enjoyed by the peers of England, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, the peers of Scotland be disabled from receiving subsequently to the Union a peerage of Great Britain, with all the privileges usually incident thereto?" The Lord Chief Baron delivered the unanimous opinion of the judges, that "they are not disabled" from receiving such patent. The House afterwards presented a report to the King, certifying "our humble opinion and advice that the said Duke of Brandon is entitled to his writ of summons."

*Wensleydale
Case.*

Again, in the *Wensleydale Peerage* (5 H. L. C. 958), where the Crown purported to create by patent a life peerage with a seat in Parliament, the House, without any reference from the Crown, referred it to a Committee for Privileges to examine and consider the letters patent, and to report their opinion thereon, and the Committee reported that neither the said letters patent nor the said letters patent with the usual writ of summons issued in pursuance thereof, entitled the grantee therein named to sit and vote in Parliament. The House affirmed the resolution, and declined to put any question to the judges on the matter.

The precedents above selected sufficiently attest the jurisdiction of the House of Lords to deal of its own motion with matters involving its constitution and privileges, and this jurisdiction, it is important to note, is an exclusive one. The Courts of law have no jurisdiction in regard to matters of peerage. All authorities agree in asserting that a dignity cannot be demanded by any writ given either by the common law or the statute. (Redesdale Committee, third Report, p. 51.)

Ordinary
Courts have
no jurisdiction
in peerage
matters.

Proceedings in a Court of law to establish title to a peerage are entirely unknown. No precedent for such proceedings can be found from the Conquest downwards, and so absolute is this exclusion of the ordinary tribunals that if a question of peerage arises even incidentally in an action it is not to be tried by a jury, but by the record of Parliament. (See Coke, Inst. I. 16 b.) In support of this proposition Coke refers to a case in the Year-Book, Hilary term, 35 Hen. VI., in which it is stated that in the King's Bench a person summoned a grand jury in attain, and one of the grand jury challenged himself, alleging that his ancestors had been Lords of Parliament, and that they had their place in the same House of Parliament; and this matter was found by six of the jurors appointed triers for that purpose; and he therefore prayed allowance of his challenge. But

Fortescue (the Chief Justice) said: "We cannot allow that without a writ testifying it, for we ought to be assured by matter of record of your challenge, or otherwise we cannot allow it," to which all the Court agreed; therefore he was drawn for another cause. (See also Redesdale Committee Reports, Vol. I. p. 396.)

A different view was, it is true, propounded by Lord Holt in *Rex v. Charles Knollys* (Skinner, 517). The defendant pleaded that he was a peer, and according to Lord Holt's view the Court had jurisdiction to determine the question, and the Lords had no jurisdiction without a reference from the Crown. This view as to the jurisdiction of the Courts in peerage matters, though expressed by a great lawyer and judge, is wholly irreconcilable with long constitutional usage, and it is not approved by the Redesdale Committee in their Reports, and must be regarded as erroneous. No attempt has ever been made to try a peerage case by an action in the Courts, and it is clear, from the recent case of *Earl Cowley v. Countess Cowley* *Cowley Case.* (1901, A. C. 450), that any such attempt would be foredoomed to failure. In that case Lord Cowley, who had been divorced by his wife, sought to restrain her from using the title of Countess Cowley on the ground that her using that title was an injury to his incorporeal hereditament, the earldom. The action was brought in the Probate and Divorce Division of the High Court, and an injunction was granted by the Court; but the action was subsequently dismissed by the Court of Appeal, and on appeal to the House of Lords the decision of the Court of Appeal was unanimously upheld. Lord Halsbury, in giving judgment, said: "More than one reason occurred to my mind in considering this question. I do not know what jurisdiction the Divorce Court had in dealing with this matter at all. And, further, it seems to me that if Mr. Haldane had been successful in suggesting that this was a case in which there was a sort of territorial right in respect of the dignity, he would only by another process show that he was hopelessly out of Court, because what jurisdiction has any Court of law to determine a question of a dignity? I am not aware of any such jurisdiction. If, indeed, there was a claim to such right, the jurisdiction would be vested in this House not as an appellate House from a Court of law, but in its own inherent jurisdiction as the Committee for Privileges. It has been laid down that no question of honour can be tried by a Court of law. Where there was a question of a fine quoted in Collins, and ancillary to it a question of a dignity, it was said by the learned judges in that case that they were not going to allow by a side wind a matter outside their jurisdiction to be brought in on the pretence that there is a question which the ordinary Courts, by an action in the Court of Common Pleas, had a right to determine. . . . My Lords, under these circumstances, I have thought

it right to say this much. I think it is not a very abstruse point. It is admitted by everybody that no such case was ever heard of before, and that the question might equally arise not only in the case of two persons divorced but even in the case of a courtesy title to certain ranks of peerage. That a Court of law should concern itself with such a question as that is certainly not a thing to be desired; but it is enough to say that, for a Court of law, there is no foundation for any jurisdiction, and there is no precedent to be found where such a question has ever been decided," &c. Lord Macnaghten, in concurring, said: "It" (the retention of the title) "is not a matter of right; it is merely a matter of courtesy, and allowed by the usages of society. . . . The appellant complains. He says she" (the respondent) "has no right to do so. That is perfectly true. And then he claims an injunction from a Court of law to prevent his late wife using that designation on the ground that it is an invasion or disturbance of the dignity which belongs to him as an incorporeal hereditament. The answer seems to be twofold. If it be a disturbance of a dignity, that is a matter not within the cognizance of a Court of law. The right to a peerage can only be tried before the peers. And it was declared long ago that 'it appertained altogether to the Royal prerogative to give such honour, reputation and place to his councillors and others his subjects as should be seeming to the King's most excellent wisdom.' (31 Hen. VIII. c. 10.) There is another answer which, to my mind, is equally conclusive. It is said that Lord Cowley has not suffered either legal wrong or damage. Mr. Haldane argued that a legal wrong had been done to him because the respondent, under colour of right, claimed to share or participate in his incorporeal hereditament the Earldom of Cowley; but, for my part, I must confess I cannot understand in what sense it can be said that the lady claims to participate or share in this hereditament." Lord James of Hereford spoke to the same effect. Lord Brampton agreed. Lord Lindley's speech puts this point very clearly and conclusively: "My Lords, by letters patent under the Great Seal, dated 11th April, 1857, the dignity of the Earldom of Cowley was granted to the then Baron Cowley and the heirs male of his body. The dignity so granted was an incorporeal hereditament (Cruise's Digest, Chap. 14, para. 1), and such hereditament was granted for an estate in tail male. In 1895 this estate became vested in the present Earl, and it has ever since been and is now vested in him. In 1889 the present Earl Cowley married Lady Violet Neville. She was the daughter of a peer, and therefore of noble blood, but she was not a peeress in her own right. When, in 1895, her husband became Earl Cowley, she acquired an estate for life in his dignity. (See Co. Litt. 16 b.) That has been the law ever since Coke's time, and it is not, I believe, disputed. Her life estate

was not terminable on the death of her husband, but was terminable on a second marriage with a commoner. (See Co. Litt. 16 b.) So long as her life estate in the earldom was undetermined she was entitled to the honour and dignity of a peeress and the name attached to it. . . . My Lords, we are not now sitting as a Committee for Privileges to determine a claim to the dignity created and granted by the letters patent, 1857. The lady calls herself, and is called in society, 'Violet, Countess Cowley.' She makes no claim to the peerage or to the dignity which is vested in her late husband, and, if she did, the High Court would not be the proper tribunal to entertain or decide such a claim. Chapter 6 of Cruise on Dignities is conclusive as to that. The appellant's counsel urged your Lordships to take the view that the Countess was disturbing the Earl in the enjoyment of his dignity, *i.e.*, of the incorporeal hereditament to which he is entitled. On reference to the authorities relating to actions on the case for disturbance, I can find no instance of an action for disturbing a dignity, nor any instance of an action for disturbing an incorporeal hereditament in the absence of actual damage." Appeal dismissed, with costs.

CHAPTER III.

WHAT LAW GOVERNS PEERAGES AND WHERE IT IS TO BE FOUND.

What law
applies.

THE law of peerage, like so much other English law, is of a composite character. It consists of—

1. Statutory enactments.
2. Common law rules. These common law rules include—
 - (i) Rules evidenced by established usage.
 - (ii) Rules ascertained by decisions or declarations of the House of Lords.
 - (iii) Rules drawn from other common law sources.

1. Statutory Enactments.

Statutory
enactments.

The leading statutes which have from time to time more particularly affected peerage law are the following :—

- 2 Rich. II. c. 5, *De Scandalis Magnatum*, and 12 Rich. II. c. 11, both of which relate to the punishment of slanders concerning the nobles and great men of the realm. These have been repealed by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59).
- 5 Rich. II. st. 2, c. 4, requiring attendance in Parliament of peers summoned thereto.
- 20 Hen. VI. c. 9, provides for the trial of peeresses by the House of Lords; and see 6 Geo. IV. c. 66, s. 12.
- 26 Hen. VIII. c. 13, which makes special provision for forfeiture of lands and hereditaments for treason.
- 31 Hen. VIII. c. 10, which deals with the precedence of peers in Parliament and elsewhere.
- 33 Hen. VIII. c. 12, s. 7, which deals with the trial of peers for murder.
- 35 Hen. VIII. c. 2, s. 2, which also deals with treason, &c.
- 7 & 8 Will. III. c. 3, s. 10, which provides as to the summoning of peers on trial of peers for treason or misprision.
- 6 Anne, c. 11, the Act of Union with Scotland, which provides for the status, precedence, privileges and trial of Scotch peers,

and for the election of representatives to sit in the House of Lords, &c.

6 Anne, c. 78, which contains provisions as to trial of peers for treason and felony committed in Scotland.

39 & 40 Geo. III. c. 67, which effectuated the Union with Ireland and provided for the status, precedence, privileges and trial of Irish peers, and for the election of representatives to sit in the House of Lords.

6 Geo. IV. c. 66, s. 12, which made further provisions as to the trial of peeresses.

10 & 11 Vict. c. 52, ss. 2, 3, and 14 & 15 Vict. c. 87, s. 4, as to meetings of peers of Scotland to elect representative peers, omissions from and additions to election roll, &c.; ten days' proclamation instead of twenty-five.

33 & 34 Vict. c. 23, which abolishes forfeiture for treason and felony.

33 & 34 Vict. c. 77, s. 9, which provides for the exemption of peers from service on juries.

34 & 35 Vict. c. 50, s. 8, writs not to be issued to disqualified peers.

39 & 40 Vict. c. 3, s. 67, as to Irish peerages; and

46 & 47 Vict. c. 52, as to disqualification of peers by bankruptcy.

Besides the above general Acts, there are not a few Acts which have been passed dealing with particular peerages by way of creation, forfeiture, restoration, or otherwise. (See *infra*, Chaps. XVII., XVIII. and XIX.)

2. Common Law Rules.

(i) *Rules Established by Long Usage.*

Peerage law consists for the most part of rules evidenced by long- Usage. established usage—usage which has prevailed from time immemorial, or has at least the sanction of some centuries. As points of peerage law from time to time arise, the question asked is always, "What has been the usage in such cases?" Once an ancient and well-settled usage is ascertained it will govern the case as evidencing the unwritten law.

For example, the rule that an hereditary barony is created by writ and sitting thereon is the result of usage. So is the rule of abeyance in regard to the descent of a barony by writ, and the power of the Crown to call such a barony out of abeyance. So is the power of the Crown to summon the eldest son of a peer during his father's lifetime in his father's barony. The rules as to the status, rights and privileges of a peer are to a large extent founded on usage.

Indeed, Lord Campbell, L. C., went so far as to say (*Berkeley Case* (1861), 8 H. L. C. 79) in the House of Lords that "peerage law depends

entirely on usage both as to power of the Crown and as to any claim that may be made by a subject."

But this is to overstate the truth. Though the unwritten law of usage largely predominates, there is a substantial element of statute law, as the summary of Acts above given shows.

Non-usage.

Non-Usage.—This may afford quite as cogent evidence of the law as usage.

"As usage," says Coke (Inst. I. 81 b), "is a good interpreter of laws, so non-usage—where there is no example—is a great intendment that the law will not bear it, for, saith Littleton, if any action might have been grounded upon such matter, it shall be intended that some time it should have been put in ure."

Thus the absence of any usage for trying the title to a peerage in the ordinary Courts of law affords cogent evidence in negation of the jurisdiction of those Courts to deal with such a matter.

The *Berkeley Case* (1861, 8 H. L. C. 80) indicates the reliance placed on non-usage. "It has been solemnly decided by your Lordships," said Lord Campbell, L. C., in that case, "in the exercise of your unquestionable jurisdiction, that the Crown cannot make a peerage for life with a right to sit in this House, and the *ratio decidendi* was that no instance could be adduced of a peer sitting in this House in right of a peerage granted for life only There being no instance to be found of a barony by tenure with a right to sit in Parliament being transferred to a stranger by will, the constitutional and legal inference was and is that a transfer cannot lawfully and effectively be made."

(ii) *Rules ascertained by Decisions or Declarations of the House of Lords.*

Rules from decisions, &c. of House of Lords.

Many points of common law in relation to peerages have been ascertained by decisions and declarations of the House of Lords and its Committees of Privileges.

These decisions and declarations have, as already stated, been given or made sometimes in regard to a particular peerage case referred by the Crown to the Lords for their advice, sometimes in a case brought under consideration without any such reference, as in the *Wensleydale Case* (p. 14, *supra*), and sometimes without reference to any particular case, as in the resolution in the *Grey de Ruthyn Case*, pp. 12, 22.

In any case, they are entitled to great weight and authority; for, though not in the technical sense judgments, they are judicial conclusions enunciated by the Lords in the exercise of a constitutional jurisdiction and resting on principles not confined to a particular case, but governing or affecting other cases of similar kind that may come

before the House. They have the quality of *responsa prudentum*; that is to say, they are declarations of law made by persons of great learning and peculiarly cognizant of peerage law, and such *responsa—communis opinio juris prudentum*, the opinion of the sages of the law—are one of the well-recognized sources from which the common law is properly discoverable. (Per Lord Coke, Inst. I. 11 a.)

The principles, therefore, on which peerage cases have been decided by the House of Lords, and the rules and declarations of law in regard to peerages and peerage law which have from time to time been deliberately laid down and acted on by that House, are to be treated *prima facie* as authoritative declarations of law or cogent evidence of it; and it is for those who challenge such declarations to make good their objections.

The Crown, it is true, is not bound to act on the advice tendered to it by the House of Lords, but it cannot effectively overrule or ignore the principles on which the advice is based.

Thus, if the House holds that a peerage has been forfeited, and therefore that the claimant has not made out his title, the Crown may disregard this ruling and direct a writ to issue to the claimant in the name of the forfeited title. But when the person summoned thereby seeks to take his seat, grave questions would or might be raised as to his status and precedence. If the title is of higher degree than a barony the question might be raised, Has it been duly created by a mere writ? (see p. 56) or has the writ operated merely to create a barony, and, if so, by what title? And in any case the question might be raised, Where is the person summoned to be placed? What is his precedence under the Statute of Ranking (31 Hen. VIII. c. 10)?

The House of Lords would have a right to determine these questions and to adhere to their prior decision in regard to the particular peerage, and to assert and maintain the inviolability of their privileges, and to say that the person summoned was not entitled to the old peerage, however he might be entitled to a new dignity.

So, too, if the Crown on petition recognizes a claim to a peerage without consulting the Lords and issues a writ accordingly, it would rest with the Lords to determine whether the person summoned was entitled to the old peerage or to a newly created peerage.

In this way the House has indirectly the power of enforcing its own decisions and declarations of the law. The only appeal from the Lords is to the Lords.

No doubt it may be objected to some declarations of the law made by the House of Lords that they were unnecessary for the decision of the particular case, or that they went further than was necessary for

Declaration of
law may be
effective
though made

without
reference.

the decision of the case, or that they were made generally, and can only be considered as extra-judicial conclusions.

But this does not deprive them of due weight. Thus in the *Grey de Ruthyn Case*, the resolution passed by the Lords that a peerage is inalienable was not in any sense necessary to the decision of the case; and so also the resolution in the *Purbeck Case* went much further than was necessary for the decision of that case; but these resolutions have long been treated as valid and binding in declarations of the law. (See the *Earldom of Norfolk Case*, (1907) A. C. 10, *infra*, p. 160.)

Retrospective
operation of
decisions and
declarations
as to the
common law.

Here it may be well to pause for a moment and point out that where the common law is ascertained, whether by decision or declaration of the House of Lords, the law as so ascertained is taken to have been in force from time immemorial as part of the common law of the land, and is, therefore, applicable to ancient cases as well as to modern cases. Thus in the *Norfolk Case* just referred to, it was held that the law as ascertained by declaration of the Lords in the *Grey de Ruthyn* and *Purbeck Cases* was applicable to a transaction which took place in the year 1302, and that the House was bound to apply that law accordingly.

This is based on the principle that in peerage matters the House of Lords has merely to ascertain the law and apply it. It was contended that it would be hardship to apply the law as ascertained in the year 1906 to a transaction which took place in the year 1302; but, as pointed out by the Lords who took part in the decision, there was no jurisdiction thus to restrict the operation of the common law.

Res judicata
no absolute
bar in
peerage
matters.

Decisions and declarations as to the law given and made by the House of Lords are only evidence of the law, and, however cogent, they do not absolutely and irrevocably determine that the law is as so decided and declared.

No doubt, where a peerage claim is allowed by the House and the Crown acts thereon, that is conclusive as regards that particular case. This was recognized in the *Willes Peerage Claim* (L. R. 4 H. L. p. 126). "A resolution of the Committee of Privileges," said Lord Chelmsford in that case, "in favour of a claimant, agreed to by the House and communicated to the Crown, and which is followed by a writ of summons to the claimant by the title of the dignity claimed, established the right to that dignity, at all events from the date of the writ of summons, which can never afterwards be called in question."

But the House is not bound to perpetuate bad law. Thus in the *Willes Case*, *supra*, it was held that the prior decision of the House in the *Earldom of Devon Case* (2 Dow & Cl. 200), holding the grant of a dignity to a man and his "heirs male for ever" to be valid was not conclusive in another case.

So the decision of the House in the *Beaumont Case*, 1794-5 (Cruise,

214) as to the destruction of a peerage in abeyance, where one of the co-heirs was attainted, in no way prevented the House of Lords in the subsequent cases of the *Camoy's Peerage*, 1838 (6 Cl. & Fin. 789), and the *Braye Peerage* (*ibid.* p. 757) from overruling the former decision and deciding inconsistently with it.

(iii) *Rules drawn from other Common Law Elements.*

Where statute law or the decisions or declarations of the House of Lords fail to supply an answer on points of peerage law, recourse must be had to the general principles and rules of the common law. General rules of common law.

Thus, the interpretation of a peerage grant; the descent of a peerage, so far as not depending on usage; the limitations allowable; the operation of attainder and restoration; these and many other matters which will be referred to in the following pages are all governed by common law rules and principles.

But in applying those common law rules and principles it must always be borne in mind that we are dealing in a peerage with an inheritance of a peculiar character, inalienable and impartible, and, therefore, that such rules must be applied according to the maxim, *Secundum subjectam materiam*, with due regard, that is, to the special character of a peerage.

Instances will be found later on in which difficult questions of peerage law were solved by reference to common law principles, as, for example, the *Wiltes Peerage Case* (L. R. 4 H. L. 126), the *Buckhurst Peerage Case* (2 App. Cas. 1), and the *Wensleydale Peerage Case* (5 H. L. C. p. 958).

Where Peerage Law is to be found.

The statutory enactments can be found in the Statutes at Large.

The usages in regard to peerages are to be found—

Where law to be found.

- (1) In the Rolls of Parliament;
- (2) In the Journals of the House of Lords;
- (3) In the Patent and other Rolls;
- (4) In the law reports and year-books;
- (5) In divers text-books, legal, historical, and antiquarian, by eminent authors;
- (6) In the Reports of the Lords' Committee on the dignity of a peerage.

As to writers of authority on the subject the following notes may be found useful :— Text-books.

Sir Edward Coke, Chief Justice of England in the time of James I. Coke.

Coke was born 1552; Recorder of London, 1592; Solicitor-General, 1593; Attorney-General, 1594; was appointed Chief Justice in 1606,

and died 1633. He is said to have spent the last six years of his life in putting the finishing touches to his books. Coke's chief contributions to the subject will be found in his *Institutes* and his *Reports*, twelve volumes, *passim*. Needless to say, his statements of the law and his opinions are entitled to the highest respect, for he is one of the chief oracles of our common law. Lord Bacon, his lifelong rival and enemy, is constrained to admit that Coke's *Reports* contain "infinite good decisions and rulings over cases"; and Blackstone calls them some of the most valuable of the ancient reports. Even what Coke says, though without authority, is, as Eyre, C. J., remarks (2 Bing. 296, 297), accepted as law (*prima facie*), so high stands his reputation. No man assuredly had a better right than he to stamp the legal currency.

In the Redesdale Committee Reports attempts are made, but without signal success, to disparage his authority on the strength of some slight inaccuracies.

Doderidge.

Doddridge or Doderidge was born in 1555; was appointed Solicitor-General in 1604, and made a judge in 1612. The principal memorial we possess of his work is his argument on the *Abergavenny Claim*, 1605, in favour of peerages by tenure set out in Collins, *Claims*, p. 97 *et seq.*; and the speech he delivered on the *Great Chamberlain Case* in 1626, in relation to the title to the office of Lord Great Chamberlain. He also concurred in the judgment delivered by Chief Justice Coke about the same time on the *Earldom of Oxford Case*. (See Collins, p. 176.) But besides these authentic contributions to the subject, there has been attributed to Doddridge a work which bears his name indeed, but was not published until long after his death, which occurred in 1628. This work first appeared in 1642, under the title of "A Treatise whether the Barony of Abergavenny be descended unto the lady being the daughter and heir of the Honourable Henry Neville, the late Baron, or unto the heir male, unto whom the Castle of Abergavenny, being anciently the head of that family, is descended." The work consisted of Doddridge's arguments in the *Abergavenny Case*, *supra*, to prove that the barony was attached to the tenure of Abergavenny Castle. The work next appeared in 1642 as "Bird's Magazine of Honour," "perused and enlarged by that learned and judicious lawyer, Sir John Doderidge, Knight, one of his Majesty's judges of the King's Bench." In 1657 a new title was given to the work, and in the following year the title was again changed to "Judge Doderidge, His Law of Nobility and Peerage, &c., to the Laws and Customs of England, 1658." The work has been repeatedly referred to in peerage cases as if it were a work of authority. Thus in the *Devon Peerage Case* (Sir Harris Nicholas' Report, p. 44) Lord Chancellor Brougham relied on the work as authentic. On the other hand, Lord

Chief Baron Parker, in giving his opinion in the *Ferrers Case* (2 Eden, 376), says that "this is a posthumous work printed in 1658, many years after the death of the learned judge, and so incorrectly that it is not to be depended on."

John Selden. His contribution to the subject is contained in his "Titles of Honour," published in 1614, second edition 1631, and in his "Privileges of the Baronage of England," published 1642. (See Wilkes' complete folio edition of Selden's works.) Selden was born in 1584, and died 1654. He was a man of extraordinary learning, scholar, lawyer, historian, statesman, and antiquary, and this catholicity of study and research exhibits itself in his "Titles of Honour," which ranges over all countries and all ages, from the Kings of Rome to the Counts Palatine of Germany, and the Thanes and Earls of England.

Sir William Dugdale, the learned writer, published in 1675 his valuable work intitled "The Baronage of England," &c. It is a work of infinite value, crowded with references to the records in verification of the statements contained in it. He published other works of great learning and value.

Arthur Collins' (1690–1760) "Proceedings, Precedents and Arguments on Claims and Conclusions concerning Baronies by Writ and other Baronies," published 1734. This is a most valuable work, and is constantly referred to by the Redesdale Committee and others.

Another standard work of his is Collins' "Peerage, Genealogical, Biographical and Historical," in 9 vols., 1812.

Thomas Madox, who, at the close of Queen Anne's reign, was historiographer, wrote a history of land honours and baronies and tenure *in capite*, intitled "Baronica Anglica," &c., which was published in 1736 and re-issued in 1741. Madox was one of the most industrious of historians and antiquaries in his researches amongst original records.

Comyn's Digest. This digest appeared in the year 1762 in translation from Norman-French. It was compiled by Chief Baron Comyn, and it has always been accepted as a work of very high authority. (1 Maule & Selwyn, 363.) Lord Kenyon, in adopting an opinion expressed in it, said: "Though no authority is referred to in support of it, yet the opinion alone of so able a lawyer is of great authority" (*Milner v. Milnes*, 3 Durn. & E. 631), and added that he was considered by his contemporaries as the most able lawyer in Westminster Hall.

So Best, C. J., citing Comyn's opinion in his Digest, said: "This he lays down on his own authority without referring to any case, and I am warranted in saying we cannot have a better authority than that learned writer." (*Hudson v. Revett*, 5 Bing. 387, 388.)

William Cruise wrote at the commencement of the nineteenth

century his work intituled "The Origin and Nature of Dignities or Titles of Honor." This work passed into a second edition in 1823, and the author died in 1824. The work is one of great value, and has been constantly referred to in peerage cases. In the *De Lisle Case* (Nicholas' Report, 204), Lord Redesdale referred to it as "an extremely useful compilation"; and in the *Berkeley Peerage Case* (1861, 8 H. L. C. 122), Lord St. Leonards described Cruise as a useful but not a very accurate writer. In the recent *Norfolk Peerage Case* his work was frequently referred to.

Redesdale
Committee's
Reports.

The Reports of the Committees appointed to search the Journals of the House, Rolls of Parliament, and other records and documents for all matters touching the dignity of a peer of the realm (in this work called the Redesdale Committee). These Reports were dated as of the date when they were ordered to be printed by the House.

The first Report, commonly so called, 25th May, 1820.

The second, 26th July, 1820.

The third, 29th July, 1822.

The fourth, 4th July, 1825.

It is well known that these Reports were written by the first Lord Redesdale, who died 1830, aged 81. In the *Devon Peerage Case* (1832, 2 Dow & Cl. 204), the Lord Chancellor said, with reference to the third Report: "It is the report of a Committee; it is the opinion of a very learned man. . . . It is the report of one of the most learned lawyers, deserving the most high and profound respect." So in the *Wensleydale Case* (5 H. L. C. 958), Lord Cranworth, in his speech in the House of Lords, referred to the third Report as having been prepared "under the careful supervision of Lord Redesdale," and then treats him as the author. So in the *Berkeley Peerage Case* (8 H. L. C. 95), Lord Cranworth referred to "the late Lord Redesdale, supposing him to be, as he is understood to have been, the author of the Reports on the dignity of a peer of the realm." Again, Lord Davey, in the *Norfolk Peerage Case* in 1906, said: "All the Reports were written by Lord Redesdale."

The Reports are in five volumes, with valuable appendices.

The first Report deals, for the most part, with peerages by tenure, and goes far to negative the continued existence of such peerages.

The second Report is very short and of an interim character.

The third Report is divided into several divisions—

- (1) Dealing with the decisions and resolutions of the House on claims of peerage, and generally touching the dignity of peerage.
- (2) Dealing with the nature and origin or creation of dignities of peerage and the succession thereto.

- (3) Dealing with the origin of the dignity of a peer, the different degrees of the dignity, and the means by which a right to the dignity may be acquired.

- (4) Dealing with the subject of forfeiture for treason, &c.

These Reports and the appendices represent an enormous amount of research, and form a most valuable collection of relevant facts. The conclusions of law at which the Committee arrive have, in some cases, been adopted by the House of Lords—as, for example, the conclusions as to peerages by tenure; but for the most part the Committee's conclusions or suggestions in regard to peerage law have been rejected by the House or have been otherwise proved unsound. For example, the Committee repeatedly urge that the doctrine that a writ followed by a sitting creates a peerage should not be applied earlier than, at any rate, the time of Richard II., whereas the doctrine has been subsequently held by the House to apply as from the time of Edward I., the *Mowbray Case* having recognized a peerage, as created by sitting, as dating as far back as 11 Edw. I. Again, the Committee emphasize strongly the danger of error which may arise from applying the rules as to land to peerages; yet the House has again and again since the Reports disregarded these suggestions and applied those rules. Again, the Committee, in effect, recognize life peerages as valid, but the House, in 1856, took the opposite view. These are only some examples of the cases in which the House of Lords has found itself unable to adopt the conclusions of the Committee.

Notwithstanding the respect due to the learning and research displayed in the Redesdale Committee's Reports, the conclusions laid down therein are in no sense binding on the House of Lords. Thus, in the *Devon Case* (2 Dow & Cl. 200), reliance was placed by a counsel on passages in the Reports, but the Lord Chancellor said: "The House is not bound by this. It is the Report of a Committee; it is the opinion of a very learned man; but then, if it is not binding against you, no more is it binding for you, so there is no use in citing the authority. It is the report of one of the most learned lawyers, deserving most high and profound respect." In reply to this, counsel said: "I am aware that there are many statements in these Reports which are not founded in law; at least, which are very much questioned by men of great legal judgment." The Lord Chancellor replied: "There is no doubt of that."

Nevertheless the Reports of the Committee are constantly referred to in peerage cases as a great repertory of facts and information, and not the less because it commonly happens that both sides can find passages which support their diverse conclusions.

CHAPTER IV.

MODES OF CREATION.

The Crown
the creator.

ALL peerages are derived, as we have seen (p. 1), from the Crown as the fountain of honour and dignity, the creation of dignities being one of the *prérogatives* of the sovereign.

At the present day, peerages, whatever the rank they confer, are always created by letters patent of the Crown under the Great Seal, and this mode of creation has been in exclusive use for several centuries. In ancient times no such uniformity prevailed, and the mode of creation varied considerably.

Earldoms.

1.—(a) From the Conquest downwards for several centuries the usual mode of creating an earldom was by oral grant or declaration of the sovereign, accompanied by the ceremony of girding with a sword by way of investiture. The grant, in early days, very commonly conferred the right to the third penny of the Pleas of the county (*infra*, p. 34), and generally there was a charter recording, directly or indirectly, the grant and the investiture.

After Edward II., and until the end of the reign of Richard III., this oral declaration and investiture sometimes took place in Parliament.

(b) An earldom was sometimes created by Act of Parliament in the form of a Royal Charter, expressed to be made with the assent of Parliament or ratified by Parliament.

Dukedoms
and
Marquisates.

2. From the time of Richard II. dukedoms and marquisates were for some centuries commonly created by charter, but, like earldoms, they were sometimes created by investiture in Parliament.

3. Viscounties have always been created by letters patent.

Baronies.

4. As to the mode of creation of baronies—

(a) Before the time of Edward I. it is doubtful whether baronies, as separate and distinct inheritances independent of the tenure of land, existed. The tenants *in capite* of the Crown, or some specially qualified section, were the Barons, and it was the tenure of land which conferred the qualification for, or the right to receive, a summons to the great councils of the realm.

See further as to baronies by tenure, *infra*, Chap. XVI.

- (b) In the time of Edward I. baronies as separate and distinct inheritances were first introduced: they were created by writ and sitting pursuant thereto, and thenceforth until 1387 this was the only mode in practice by which baronies were created.
- (c) In 1387 came the first creation by patent, next in 1433, and next in 1441, and thenceforth the creation of baronies by writ and by letters patent were both in use, but gradually creation by letters patent superseded the creation by writ, and from the time of James I. creation of baronies by patent has been almost exclusively adopted.

The first case in which a peerage was created by letters patent was in 11 Rich. II., 1387, when John de Beauchamp of Holt was created Lord of Beauchamp, Baron of Kyderminster, with a limitation to him in tail male (App. No. 33). The next instance was in 11 Hen. VI., 1433, when the barony of Faunhope was granted in tail male (App. No. 42). The next, in 1440, when the viscounty of Beaumont was granted by letters patent (App. No. 43), and the next in 1441 when the barony of Sudeley and Milbroke was granted. But from 24 Hen. VI. (*infra*, p. 55), the practice of creating peerages by charter was, for the most part, superseded by the use of letters patent.

First peerage
by letters
patent.

The Redesdale Committee thus expressed themselves (third Report, p. 40) on the subject: "Creation of the dignity of peerage has been said, by Sir Edward Coke, to be in two manner of ordinary ways; by writ and by letters patent, and by another and extraordinary way of creation, namely, by the King in Parliament. The creations by the King in Parliament have been, as far as they appear on the Rolls, creations by parol, and by investiture with the dignity created; and upon such creations in Parliament, letters patent of the King, declaring the facts of parol creation and investiture, seem to have been generally, if not always, delivered to the person on whom the dignity was conferred; and there seems to have been no difference between such creations in Parliament and creations out of Parliament, except that in cases of creations in Parliament the assent of the Parliament to the creation is frequently stated, and the person created being present in Parliament, and there invested with the dignity, took his seat in Parliament immediately, according to the degree of dignity with which he was so invested, without any writ calling him to the Parliament by the name of dignity then given to him. If advanced only in dignity, being before a peer, he had been summoned by his former name of dignity; but if not before a peer, he was brought into the Parliament by the King's verbal order; and being invested with this new dignity, took his seat in Parliament according to the

Redesdale
Committee on
modes of
creation.

rank which that dignity gave him. Of such creations many instances will be given in another division of this Report. Many earls were created out of Parliament, by verbal declaration of the King and investiture by girding with the sword, of which several instances will also be given; and the patent delivered to the person so advanced in dignity recited the fact of the previous creation and investiture; and (except as it may have contained a grant of the third penny of a county, or of an annuity payable by the sheriff out of the issues of a county, or a grant of lands to enable the grantee more honourably to support his new dignity) the patent seems to have been intended only as an authentic declaration of the fact of the verbal creation, and of the fact of investiture with the dignity; a ceremony in later times dispensed with by the terms of the letters patent testifying the grant of such dignities. In some cases the creation may, from the peculiarity of the grant, have required the assent of Parliament to give full efficacy to all the terms of the grant; as in the case of the creation by Edward the Third of his son Edward, Duke of Cornwall, with singular limitations inconsistent with the ordinary rules of law. Whether any dignity of peerage, except that of baron, was ever considered as created by writ, is a question which the Committee have found themselves unable positively to answer."

Earliest
known
charters.

The earliest peerage charters whereof the terms are known are those relating to the creation of earldoms in the time of King Stephen.

Translations of some of those charters, or of the material parts, are set out in the Appendix, and it will be observed in perusing them that they do not as a rule purport to create the earldom but only to record the creation thereof.

The Redesdale Committee, in regard to this earldom, make the following observations in their third Report, p. 167:—

"From all the documents which the Committee have found it seems most probable that all the persons who first obtained the dignity of earl, in the reign of Stephen, either from the King or the Empress, and in the reigns of Henry II. and Richard I., were usually so created by patent and invested with the dignity by the ceremony of girding of the sword, without relation to the tenure of land. And from the terms of the same documents it seems probable that the patents of Stephen, of the Empress, of Henry II., and of Richard I., were in the form of more ancient grants of the like dignity of earl. It therefore seems probable that those who were made earls by William Rufus and Henry I. were also made by patent or invested with the dignity by girding with a sword, which seems to have been considered as the proper investiture with the dignity of earl, but this ceremony is not mentioned in several of the ancient instruments purporting the creation of earls of which the evidence has been preserved." See further, *infra*, p. 33, as to charters in relation to earldoms.

The Differences between Charters and Letters Patent.

It may be convenient at this point to say a few words as to the distinction between charters and letters patent. Charters and letters patent compared.

Royal charters in England were divided, according to the late Sir Thomas Duffus Hardy, into three classes, letters patent, letters close, and charters.

"All charters or deeds," says that learned writer, "are a species of letters patent, inasmuch as they are not sealed up like close letters, but have, like patents, the seal pendent at the bottom. Letters patent form one of the classes into which royal diplomas are divided, those of the sovereigns of England may be resolved into the following three divisions, namely, letters patent, letters close and charters." (Introduction to the Calendar of the Patent Rolls, 1802.)

The difference in the case of peerage grants between charters and letters patent is one rather of form than of substance. Both are solemn acts of the royal prerogative, both are under the Great Seal, but the two instruments vary somewhat in formal parts. Thus, a charter commences with the name and titles of the King, for example :—

"Henry, by the grace of God, King of England and France, to all Archbishops, Bishops, Abbots, Earls, Barons, Justices, Sheriffs, and all his ministers and faithful subjects in France and England, greeting, &c." Then follows the preamble. After that comes the grant of peerage and of any annuity or lands accompanying it, and the charter usually concludes with a clause known as the "his testibus clause," in which are named the witnesses in whose presence the charter was executed, with the date.

On the other hand, letters patent commence with the name and titles of the King, and are addressed to the world at large, for example, thus : "Henry, by the grace of God, &c. To all to whom these presents shall come, greeting. . . ." And at the conclusion come generally the words, "In witness whereof we have caused these our letters to be made patent (has litteras nostras fieri fecimus patentēs). Witness ourselves at —, on the — day of —, in the — year of our reign."

In his notes on *Magna Charta*, Chap. 38, Inst. II., Coke says (a) that it is these words in letters patent, "witness ourselves," which distinguish such letters patent from a charter, where the words are "his testibus, &c." "Those that had 'his testibus' were called *chartae*, and those others that be 'teste me ipso' are called letters patent. . . ." And (b) "In the beginning of the reign of Richard II. I find that this clause of 'hiis testibus' was left out, and instead thereof comes 'testē me ipso' in this manner in 'cujus rei testimonium has literas nostras fieri fecimus patentēs teste me ipso,'

which since all his successors, Kings and Queens of this Realm, except in creations, hath been used. Those that hath 'hiis testibus' were called *chartae*."

This distinction of Coke's between charters and patents does not, however, always hold good. There are many cases in which charters are referred to by the Crown itself as letters patent. Thus, referring to the charters and patents set out in the Redesdale Committee's Reports, Vol. V., p. 48, in a charter of 33 Edw. III., there is a recital of the King's letters patent creating Roger Mortimer Earl of March and granting him an annuity, but when we turn to the record at p. 20 we find the so-called letters patent to be a *charter* of 2 Edw. III.

Again at p. 79, in a charter of 10 Rich. II., we find a recital of letters patent of the same King, dated 1st December in the ninth year of his reign, creating Robert de Vere Marquis of Dublin, but turning to the record on p. 76 the instrument appears to be a charter within the definition.

So at p. 248, in a charter of 23 Hen. VI., there is a recital of letters patent of Richard II. creating Thomas Earl of Nottingham Duke of Norfolk, and the charter ratifies the "letters patent." But on referring to the so-called letters patent, p. 118, it appears that the instrument was a charter answering to Coke's definition.

Again at p. 273, in a charter of Henry VI., in the 28th year of his reign, there is a recital of certain letters patent of the same King, dated 2nd April, 1444. But here again on turning to these "letters patent," at p. 244, they are found to be a charter in Coke's sense.

Further, at p. 325, in a charter of Edward IV., there is a recital that Richard II. by his letters patent, dated 29th September, 1396, with the consent of Parliament, granted the Dukedom of Norfolk, &c. But the so-called letters patent were in fact in the form of a charter; a copy of which is set out at p. 118. Similar instances might be multiplied.

The inference they suggest is that charter was constantly used as a convertible term with letters patent.

But it is far from being the case that the charters are always referred to in recitals as letters patent.

Thus, at p. 64, an entry in the Rolls of Parliament 9 Richard II. sets out a charter of the King granting to Edward Earl of Cambridge the Dukedom of York, and refers to it as a charter. So at p. 65, 9 Rich. II., a charter creating the Dukedom of Gloucester is referred to as a charter, and at p. 76, 9 Rich. II., a charter creating the Dukedom of Oxford is referred to as a charter.

At p. 138, in letters patent of inspeximus of 1 Hen. IV., there are a series of recitals of charters and letters patent. Thus, "we have

inspected a charter of Edward III., &c. We have inspected also letters patent of the same King, &c. We have also inspected letters patent of, &c. We have also inspected another charter." In each case the recited instruments are correctly detailed, and the recited letters patent contain the words, "In cujus rei testimonium has litteras nostras fieri fecimus patentes."

Another formal difference between charters and letters patent is in the matter of the testimonium clause. Letters patent commonly concluded with a clause of the following kind, known as a testimonial clause: "In witness whereof, we have caused these presents to be sealed with the Great Seal," &c. ; whereas charters, as a rule, do not conclude with this form.

Ocasionally, however, a testimonium clause may be found in a charter. For example, a charter in Norman-French, granted by Edward III., in the thirty-sixth year of his reign, to Edward the Black Prince, concludes with the words: "Given under our Great Seal, at the palace at Westminster, the 19th day of July, in the year 1362, and of our reign the 36."

Special Features in the Creation of the Earldoms in Norman and Plantagenet Times.

(1) *As to girding with a Sword.*

From a very early period (the Redesdale Committee think from the days of the Conquest: third Report, 167), girding with the sword was treated as an important function in the creation of an earl. We still speak of "a belted earl." The function or ceremony operated as an investiture of the grantee with the dignity conferred on him, just as livery of seisin upon a feoffment of land completed the grant.

"In ancient times," says Coke in his Institutes, "earls were created by girding with a sword and nominating him earl of such a county or place, and this with a calling of him to Parliament by writ of that name was a sufficient creation of inheritance."

According to Selden ("Titles of Honour," § II. Chap. 5), "The first mention of an earl's investiture by girding him with a sword is in that of Richard the First; his creating Hugh de Pasay, Bishop of Durham, Earl of Northumberland. Roger of Wendover and Mathew Paris remember it. 'A rege comitatus gladio accinctus' (say they both) 'nomen sibi comitis usurpavit. Quo gladio accincto, Rex cum cachinno adstantibus dixit: Juvenem feci comitem de episcopo veterano.' But although we find no ancients memory of the girding with the sword, yet it is, we see, there spoken of as a custom of that age formerly enough known, and not used as a new rite of investiture."

P.

D

Bracton (Lib. I. Chap. 82), Henry III.'s Chief Justice, also refers to girding or belting as a customary ceremony in the creation of an earldom, and explains its religious and political symbolism.

This reference, in so early a writer as Bracton, to girding or belting confirms the view of the Redesdale Committee as to the ancient character of the ceremony.

References to
girding in
charters.

The earliest recorded charter in which the ceremony of girding an earl is referred to is that in 1 John, by which William de Ferrars was created Earl of Derby. "Et ipsum tanquam comitem propria manu cinximus" are the words used.

The next reference to girding occurs in a charter of 15 Edw. II. (*infra*, p. 251). It creates the grantee Earl of Carlisle, "sub honore et nomine comitis Karliolæ ipsumque Andream gladio cinximus in comitem dicti loci." Similar words occur in the grant of the same year to Hugh Despenser, Earl of Winchester: "Hugonem gladio cinximus in comitem Wynton."

In the same year we find the King granting the Earldom of Kent by charter to his brother Edmund of Woodstock, with the same formula, "Ipsumque fratrem nostrum gladio cinximus in comitem comitatus predicti" (*supra*, p. 250). Indeed, from this time onwards there are few charters creating or recording the creation of earldoms which do not contain a reference to girding with the sword, and occasionally they refer also to the placing of a coronet on the head.

(2) *As to the Third Penny of the Pleas of the County.*

Third penny
of the pleas
of the county.

In early times it was customary, in granting an earldom, to give to the grantee and his heirs the third penny of the pleas of the county.

Thus, in the grant by Maud of the Earldom of Essex (1141), the charter (as appears *infra*, p. 242) provides that the grantee is to have "the third penny of the pleas as an Earl ought to have in his county." So the Empress Maud, in making Milo Earl of Hereford, granted him the third penny "placitarum totius comitatus Herefordiæ."

And although on the grant of the Earldom of Norfolk to Hugh Bigod, in the time of Henry II., there was no grant of the third penny, yet in the grant by the same King of the Earldom of Arundel or Sussex to William de Albini, the third penny was given ("et tertium denarium de placitis de Susthsexiæ inde comes est"); and again, in the grant of the Earldom of Oxford by Henry II., the third penny was given in these words: "Tertium denarium de placitis comitatus Oxenford scyre ut sit inde comes." Under the charter of Richard I. to William, Earl of Arundel, the earl takes the third penny ("et tertium denarium de placitis de Sutsex undo comes est").

Similar terms are used in the same King's charter to Roger Bygod,

Earl of Norfolk: "Sciatis nos fecisse Rogerum Bygod comitem de Norfolciæ scirelicet de tertio denario de Norwic et de Norfolciæ sicut comes Hugo pater ejus melior unquam fuit, tempore domini regis Henrici patris nostri."

William de Ferrars, made Earl of Derby in the reign of John, was similarly given the third penny: "Tertium denarium de omnibus placitis placitatis per vice-comitem in toto comitatu de Derebi tam in Derebi quam extra unde ipse comes est."

The Earl of Warwick had the third penny of the county of Warwick (Close Rolls, 15 John), and the Earl of Devon had the third penny of the county of Devon. (Close Rolls, Hen. III.)

But though constantly accompanying the grant of an earldom, the third penny was in nowise of the essence of the dignity, nor even a necessary incident of it. The "Dialogue of the Exchequer," written in the time of Henry II., recognizes that the right to the third penny does not appertain to all earldoms, but only to such as have it by express grant from the King. See also Selden's "Titles of Honour," p. 672; and the Pipe Rolls, 2—7, Hen. II., quite tally, as Mr. Round has pointed out, with this statement of the Dialogue. They show that, of seventeen earls mentioned in those Rolls, seven were in receipt of the third penny of the pleas of their respective counties and ten were not mentioned as in such receipt. Third penny not essential.

Even when a money grant is made to an earl it is not always of the third penny of the pleas in full given. Thus in the charter by King John creating Henry Bohun Earl of Hereford the earl is given an annuity of 20*l.* per annum only of the third penny: "De tertio denario comitatus Herefordiæ annuatim percipiendas unde eum fecimus comitem Herefordiæ." Grant of part only of third penny.

Hubert de Burgh had 20*l.* sterling "pro tertio denario comitatus Kancie," and the Earl of Lincoln in 17 Hen. III. a like sum; but after this date (1233) any reference to the third penny in a peerage charter is rare, as appears from the following list:—

Earldom of Kent, 15 Edw. II., annuity of 20*l.* "de exitibus comitatus Kancie . . . sub nomine et honore comitis Kancie."

Earldom of March, 2 Edw. III., annuity of 10*l.* "sub nomine, &c. de exitibus comitatus."

Earldom of Cornwall, 4 Edw. III., annuity of 20*l.* ditto.

Earldom of Gloucester, 11 Edw. III., annuity of 20*l.* "de exitibus comitatus Gloucestri."

Earldom of Huntingdon, 11 Edw. III., annuity of 20*l.* "sub nomine et honore comitis . . . de firma sive exitibus comitatus."

Earldom of Northampton, 11 Edw. III., annuity of 20*l.* ditto.

Earldom of Derby, 11 Edw. III., annuity of 20*l.* "de exitibus comitatus."

Earldom of Suffolk, 11 Edw. III., annuity of 20*l*. "sub nomine, &c. de firma sive exitibus comitatus," &c.

Earldom of Salisbury, 11 Edw. III., annuity of 20*l*. "de exitibus comitatus."

Earldom of Gloucester, 14 Edw. III., annuity of 20*l*. "redditus de exitibus comitatus."

Earldom of Lincoln, 23 Edw. III., annuity of 20*l*. "pro tertio denario comitatus illius."

Earldom of Cambridge, 36 Edw. III., annuity of 20*l*. "sub nomine comitis cantabr pro tertio denario comitatus de exitibus ejusdem comitatus."

Earldom of Northumberland, 1 Rich. II., annuity of 20*l*. "de exitibus ejusdem comitatus."

This seems to have been the last charter or patent granted with reference to the third penny and annuity upon the creation of an earldom. The subsequent charters did not grant the third penny or any annuity for or in respect thereof; they generally granted an annuity of 20*l*. to be paid out of the returns of the county "de exitibus comitatus."

(3) *As to the supposed Official Position of an Earl in his County.*

Supposed
official
position of an
earl.

Coke, in his report of *Nevil's Case*, states, either as his own opinion or as the opinion of the judges, that an earl "by the common law was a great conservator of the peace, and that sheriffs were called 'vice-comites,' because in ancient times they were as deputies to earls, though then it was changed."

It seems, however, more than doubtful whether there was any substantial foundation for this opinion. The sheriff was the Crown's officer in the county, and remained such, and he was, it appears, in no sense the subordinate of the earl.

The Redesdale Committee, commenting in their third Report (p. 53) on what Coke says, remark that: "As far as the Committee have been able to discover, such never was the law after the completion of the Conquest, and such was certainly not the law in the 21st of Richard II. When the patent to the Earl of Westmoreland was granted, Ralph Neville had not, by force of the patent creating him Earl of Westmoreland, any more power as conservator of the peace in Westmoreland than he had in any other county . . . Sir Edward Coke's assertion that sheriffs were called vice-comites because in ancient times they were but deputies to earls is inconsistent with the etymology of the English word 'sheriff' or 'shire reeve,' and the sheriffs of the different shires were always, after the Norman Conquest, if not before, the officers of the King, as appears in another part of this Report."

The following additional passages from the Redesdale Committee's Reports emphasize the position :—

Third Report, p. 69. "The sheriff of a shire in England, however, was, after the Conquest, if not before, the officer of the King and not the officer of an earl to whom the name of that shire was given as a local name of dignity. . . . In counties which were not county palatine, the sheriff and not the earl, who had his real name of dignity from the county, was the first officer of the Crown, both civil and military, within the county. He summoned and presided in the county Court, executed the King's commands, collected his revenue, and raised and commanded the *posse comitatus* or power of the county, as the King's immediate officer, wholly independent of the person who had the name of the county added to his name of dignity of earl; and the earl received the third penny of the pleas of the county from the sheriff by virtue of the King's grant, and under the King's warrant, for that purpose directed to the sheriff as the officer of the Crown. Madox, in his notes on the 'Dialogue of the Exchequer,' has collected several instances in which earls were appointed sheriffs of the counties, the names of which were their local names of dignity. . . . From the circumstances which Madox has stated, he has concluded '*vice-comitem fuisse regis non comitis vicarium.*'"

Third Report, p. 162. "The Saxon earls seem to have been earls of counties or districts comprising two or more counties, and they are said to have had an official duty in those counties or districts respectively; but it does not appear that the persons who had the dignity of earl in after times, and particularly in the reign of Henry II., had any official duty in the counties from which they respectively derived their names of dignity."

This is in accordance with the view of Selden, who, in his "Titles of Honour" (2nd ed. p. 674), refers to the notion that earls in ancient times had some power in the county beyond the power incident to their possessions; and after citing certain passages in ancient historians, says: "These and the like passages I conceive prove, not that earls of those times, as earls, had any power or jurisdiction through the counties that denominated them. In their possessions or earldoms they had such jurisdiction and other privileges as they had received by the King's grant, and such power besides as the largeness of their possessions and the number of their tenants only gave them, but otherwise, I think, none since the time of the Normans. . . ." And, to conclude this point, it will be plain by the laws and rolls of those ancient times that the sheriffs of counties had the government and custody of them and not the earls (unless they were palatine), otherwise than in cases where they had the sheriffwick given with

Other
authorities.

their dignities. (See also Stubbs' Constitutional History, Vol. 1, Chap. 2, pp. 270, 363; and Pollock & Maitland, Hist. of Eng. Law, I. 519.)

Creation of Baronies by Writ and Sitting.

Creation of
baronies by
writ and
sitting.

The law is well settled that if a writ of summons to Parliament, in the form usual in the case of temporal peers, has been issued to a commoner, and the person so summoned has, in response to such summons, taken his seat in the House of Lords, and it does not appear that the summons was issued to him merely as eldest son of a living peer or peeress in respect of one of his parents' peerages, the person so summoned and sitting is to be taken thereby to have acquired what is called a barony by writ descendible to the heirs general of his body, and this is so even though the summons was issued to him by mistake.

The law, as thus defined, was finally settled in 1673 (see *infra*, p. 45); and on the principle explained at p. 22, must be taken to have been the law ever since the model Parliament that sat in 1295.

It is fully recognized by Lord Coke in his Institutes (I. 16 b). There, after pointing out two different modes of creating peerages, he says: "Creation by writ is the ancients way, and here it is to be observed that a man shall gain an inheritance by writ. . . . The direction and delivery of the writ to him maketh him not noble . . . and this writ hath no operation until he sit in Parliament, and thereby his blood is ennobled to him and his heirs lineal, and thereupon a baron is called a peer of Parliament." (See also the *Abergavenny Case*, 12 Co. Rep.)

*The Clifton
Case.*

The leading case in this subject of barony by writ is the *Clifton Case*, 1673, reported in Collins, Claims, 291. In that case Catherine, Lady O'Brien, claimed the Barony of Clifton, and her petition having been referred to the House of Lords, and by the House to the Committee for Privileges, it was ordered by the House that the judges should give their opinion on this case, which they accordingly did, as appears by the Journals of the House, thus:—

"The Lord Chief Justice of the King's Bench, the Lord Chief Justice of the Common Pleas, Chief Baron, Baron Turner, Baron Littleton, Justice Atkins, Justice Ellis, and Baron Thurland, were unanimous in their opinions that, taking the case in fact to be as his Majesty's Attorney-General reported it to be, and as it stood transmitted to this House, they find it to be thus as to this lady's claim to the said barony:—

"That Sir Jervas Clifton was summoned to Parliament by the name of Jervas Clifton, of Leighton Bronswald, by writ dated 9th July, James I.

"That accordingly he did come and sit in Parliament as one of the peers of England.

"That he died (16 James I.) leaving issue behind him, Catherine, his sole daughter and heir, who married to the Lord Avhigny, afterwards Duke of Lenox.

"That the said Duke (17 James I.) was, by letters patent, created Baron Leighton, of Leighton Bronswald, in the county of Huntingdon, to him and the heirs male of his body, whereof none are now living.

"That the petitioner is lineally descended from him and is his heir, and as such now claims the Barony of Clifton."

All which being admitted to be true, they are of opinion :—

"First, that the said Jervas, by virtue of the said writ or summons, and his sitting in Parliament accordingly, was a peer and baron of this kingdom, and his blood thereby ennobled.

"Secondly, that his said honour descended from him to Catherine, his sole daughter and heir, and successively, after several descents, to the petitioner as lineal heir of the said Lord Clifton.

"Thirdly, that therefore the petitioner is well entitled to the said dignity."

The House of Lords thereupon resolved that the said Catherine, Lady O'Brien, hath right to the Barony of Clifton.

The King assented to this determination, and recognized her as Baroness Clifton accordingly.

The rule thus laid down in the *Clifton Case* was followed in the *De Clifford Peerage Case*, 1691 (Collins, Claims, 306). The barony claimed in that case was created by summons of Robert de Clifford to Parliament in 28 Edw. I., followed by sitting thereon, and the Committee of Privileges resolved (Journal, Vol. 14, p. 683) that the claimant, Thomas, Earl of Thanet, was the sole lineal and right heir to Robert de Clifford, so summoned to Parliament as Lord de Clifford, and that the said title and barony of Lord Clifford did of right belong to the said Earl of Thanet and his heirs; and this resolution was adopted by the House. *The De Clifford Case.*

In 1695, Sir Richard Verney claimed the title of Willoughby de Broke as heir general of the body to Sir Robert Willoughby, knight, summoned to Parliament in the 7th of Henry VII. as a baron, by writ directed "Robto Willoughby de Broke, chevalier." The claim was referred by the Crown to the House of Lords, and on 13th February, 1695, the House resolved that the claimant had a right to a writ of summons of the name and title of Lord Willoughby de Broke, and he had a summons and took his seat accordingly. (Collins, Claims, p. 321; Skinner, 432.) *The Verney Case.*

The following are other cases in which baronies by writ have been claimed and allowed :—

De la Warr Peerage Case. (Third Report of Redesdale Committee, p. 33.)

Abergavenny, 1605. (Collins, Claims, p. 61.)

Grey de Ruthyn, in 1640. (Collins, Claims, p. 195.)

De Ros (or *Roos*), 1666. (Collins, Claims, p. 261.)

Fitzwalter, in 1669. (Collins, Claims, p. 268.)

Willoughby D'Eresby, 1670. (Collins, Claims, p. 1.)

Botetourt. (See Nicholas' Report of the *Lisle Case*, p. 205.)

The Mowbray Case, 1877.

Redesdale
Committee on
Clifton Case.

The Redesdale Committee, in their third Report (p. 31), endeavour to minimise the effect of the resolution in the *Clifton Case*, and to negative any general application of the principle on which that case rested. "It is observable," they say, "that the opinion given by the judges upon which that decision was founded is confined, in words, to the particular case, namely, the case of Jervas Clifton, summoned to Parliament by writ in the 6th of James I., and it does not follow that the judges meant to express an opinion, or that the House, on the ground of that opinion, meant to resolve that in earlier times a writ of summons and sitting in Parliament had in law the same effect. It is, however, difficult to conceive in what manner they could ever have been deemed to have had that effect but as an inference of law from facts, and if no statute appears on the subject, the mere inference of law from the same facts ought to have been the same in the reign of Edward I. as in the reign of James I., unless non-user may be considered as having destroyed the right which continual user might have preserved. To what extent later decisions may have carried the rule beyond the case of Jervas Clifton may deserve consideration, and it may be important to consider whether the instances where descendants of persons who have been summoned by writ, and who have evidently or probably sate in Parliament, have not been summoned, will afford any ground for drawing a line which may settle this question; a line binding the point of time from which a writ of summons and sitting in Parliament may be deemed to have constituted a right vested in the descendants of the persons so summoned, and fixing a point of time when that was not the law of the land If such distinction of time can be adopted, it must, however, be founded on a supposition that the law was, during the intervening period, altered by competent authority, and as there exists no trace of an alteration by direct statute the change in the law, if made, must be taken to have been made by usage (which seems indeed to have made much of the law by which the whole frame of the two Houses of Parliament has long been regulated), unless non-user, as

before observed, can be considered as having affected the right. The Committee have not discovered on what grounds the judges gave their opinion in the case of the Barony of Clifton, or what opinion the judges had before them on the subject submitted to their consideration." Respect for the Redesdale Committee makes it proper to draw attention to the views thus expressed, but as appears from the subsequent decisions, the House of Lords has declined to take the Committee's hint. On the contrary, they have held that the *Clifton Case* established a general common law rule operating retrospectively to the time and in the reign of Edward I.

An instructive case on the subject is that of *Lord Vaux*, 1836, 1837 (5 Cl. & Fin. 576). There it was shown that A. B., the ancestor of the claimant, sat amongst the peers in Parliament in 25 Hen. VIII.; that he was duly summoned to and sat in Parliament in 28 Hen. VIII.; and that he and his heirs male, who were also heirs general, were summoned to and sat in several succeeding Parliaments by the style and title of Lord Vaux. *Lord Vaux's Case.*

There was no evidence of a writ of summons prior to the said 25 Hen. VIII., but in explanation of this, it was shown that there were no Lords' Journals extant from 7 to 25 Hen. VIII., and that the enrolments of writs during the same period were very imperfect. It was also shown that although the Patent Rolls were complete, no patent or charter of creation of a barony of Vaux, nor any record or trace of such patent, could be discovered after the most diligent searches in all the offices for records. On this evidence, it was held that the barony of Vaux was created by writ of summons and sitting in Parliament, and was therefore descendible to the heirs general of A. B.

In opposing the claim, the argument was used that there was no more reason for presuming the sitting by writ than there was for presuming the sitting by patent, and that, there being an absence of all proof of the title under which Thomas Lord Vaux sat in 25 Hen. VIII., the House was not bound to presume his sitting to be by writ, but might presume it to have been by patent. But Lord Chancellor Cottenham said: "It does not appear to me that the two presumptions stand at all on the same footing. In the first place, all peerages must have their origin in a writ, whether a peer be created by patent or by a summons from the sovereign; and acting upon that summons by taking his seat in this House, the writ must be the means of his introduction here. If there be a patent, the effect of the writ is limited by the terms of the patent, but still a writ there must be; therefore, although it is a presumption, as everything is a presumption where you have not the thing proved, yet it is an irresistible presumption that there must have been a writ, and that Thomas Lord Vaux, before he took his seat in this House, must have had a writ.

My Lords, on the other hand, the question of a presumption of a patent, when we look at the history of the peerages of that time, we find that before the custom had been introduced of creating peerages by patent, it was very rarely done, and the usual mode of creating peerages was by writ and by acting upon it by sitting in this House. It is therefore no violent presumption in point of history that a peer found sitting in the House in 25 Hen. VIII. had obtained his title to sit here by writ unaccompanied by a patent. But, my Lords, on a question of presumption the law will presume all that is necessary to account for that which appears to have been done, and it will irresistibly presume that which must necessarily have accompanied the act proved, so that when we find a peer sitting, we conclude that there must have been a writ to bring him to this House; though the writ itself is not produced, yet that there must have been a writ is a matter on which your Lordships cannot entertain any doubt. But it is a different thing when your Lordships are called upon to presume that which was not necessary to have taken place; for the peer might have sat without a patent, but he could not have sat without a writ, and there is no necessity therefore for presuming a patent, inasmuch as the patent would in all probability have created a different estate from the estate created by writ of summons. Now, my Lords, it is absolutely necessary to obtain all the information within our reach for the purpose of coming to a satisfactory conclusion as to whether there was a patent or not." And after pointing to the various searches: "Now, inquiry has been made in every place in which it appears probable or even possible that any trace could be found of the patent being granted to Thomas Lord Vaux, and the result of that inquiry is that there is no trace whatever of such a patent. There is therefore evidence as strong as any negative evidence can be that no patent exists, granted by the Crown, in which Thomas Lord Vaux took his seat in this House."

It was further suggested in the *Vaux Case* that the writ might have been in the special form adopted in the *Bromflete Case* (27 Hen. VI.), which contained the words, "volumus enim vos et hæredes vestros masculos, de contore vestro exeuntes, barones de Vesey existere." But the Committee for Privileges declined to adopt the suggestion, holding the further presumption to be that the writ was in the usual form. "The question, then," said Lord Lyndhurst, "is, are we to presume that it was a writ in a general form, or are we left in a state of uncertainty as to that point, so as not to be enabled to come to any correct conclusion? What my noble and learned friend has stated is perfectly true, that during a period of five hundred years only one case (*Bromflete*) has occurred of a writ creating a peerage in the special form which has been referred to. Under such circumstances,

I think that we are bound to presume that the writ was in the general form; and, if so, then it follows, as a matter of course, that the peerage descends to heirs general." "Why," said Lord Wynford, "are we to presume a special writ which has occurred but once and not a general writ which has occurred many times? It appears to me that the balance of evidence is in favour of the presumption that he was called here by general writ and not by patent."

Next in order on the subject comes the *Braye Peerage Case*, reported in 6 Cl. & Fin. 757, 1836 to 1839. *Braye Peerage Case.*

There it was shown that B. was summoned to Parliament as a baron of the realm by writ in the 21 Hen. VIII., 1529, and that he sat in Parliament in pursuance of such writ. Lord Chancellor Cottenham, commenting on the evidence, said: "The question to which I first refer is that which relates to the effect of the evidence of a sitting in this House under the summons by writ, there being no evidence whatever of the nature of that writ or of the creation to the peerage by letters patent. The last case on this subject was that of the Vaux peerage (*supra*), in which all the preceding cases were examined, and your Lordships adopted the resolution that where the evidence satisfactorily made out such a sitting by writ, it must be presumed that there was evidence of a title to the heirs general of the persons so summoned . . . On that part of this claim I am of opinion that we must follow the rule already laid down in the case to which I have just referred." The Committee reported accordingly. The report was adopted by the House, and the Crown acted thereon.

The *Vaux* and *Braye Peerage Cases* were followed shortly afterwards by the *Hastings Peerage Case*, reported in 8 Cl. & Fin. 144, 1840—1. *Hastings Peerage Case.*

In the *Hastings Case* it was proved that the ancestor of the claimant was summoned to Parliament in 49 Hen. III., but there was no proof that he ever sat; no Rolls or Journals being extant for that period. His son and heir, J., sat in Parliament of 18 Edw. I., but no proof was forthcoming that he was summoned to that Parliament, no record of summonses or enrolments of them being extant from 49 Hen. III. to 23 Edw. I. On this evidence it was held that J. must be presumed to have sat in the Parliament of 18 Edw. I. in pursuance of a summons, by virtue of the maxim "omnia presumuntur legitime facta donec probetur in contrarium." And accordingly that the claimant, who was the heir of J., was entitled to a barony by writ, despite the fact that there had been no recorded sitting in respect of the peerage for 450 years; the absence of any record during this long period being susceptible of explanation on the ground that during the first 250 years of that period the question was pending whether heirs male of the half-blood or heirs female of the whole blood were

entitled to succeed, and that, before that question was determined, the dignity had fallen into abeyance and remained in abeyance for the residue of the time.

Lord Chancellor Cottenham, in the course of delivering his opinion, said: "Some questions have been raised at your Lordships' bar which undoubtedly are entitled to the most serious consideration. The first of those is, how far there has been proved in this case that which is required in the absence of a patent to establish a title descendible to heirs general, namely, a summons to and sitting in Parliament. That a summons to and sitting constitute a title descendible to heirs general has been established and acted upon in so many cases that I need not now consider it a question open to discussion. . . . The sitting in Parliament must be proved by some proceeding in Parliament itself, and there is produced and proved, as of the date of 18 Edw. I., in the year 1290, the document professing to be in the nature of a grant to the King described to be 'in pleno Parlamento ipsius domini regius,' which states the barons and lords present, and, amongst others, Johannes de Hastings; and, after naming him and others, it says, 'et cæteri magnates et proceres tunc in Parlamento existentes.' The grant is stated to have been not properly the subject of a grant by Parliament; but whether the subject of a grant by Parliament or not is, I apprehend, not material, provided it appears clearly that it was a proceeding in Parliament, and the document itself states that it was 'in pleno Parlamento,' and states the parties present to have been, amongst others, 'Johannes de Hastings et cæteri magnates et proceres tunc in Parlamento existentes.' There is nothing to impeach this document as having been a proceeding in Parliament; it is therefore a Parliamentary proceeding recognizing Johannes de Hastings as being then a member of your Lordships' House, and I apprehend it comes, therefore, within all the rules by which your Lordships try the fact of whether there has been a sitting." The sitting having thus been established, his Lordship went on to consider whether the summons could be presumed, and said: "Under these circumstances, strictly speaking, the proper test and evidence of a summons would be the writ itself; but there are many cases in which writs cannot be produced, and in this case there is proof that the writs of that period, that is, the period covered by the year 1290 (18 Edw. I.), in which this individual must have been summoned, if summoned at all, are not forthcoming. . . . Under these circumstances, it appears to me that your Lordships may be well justified in coming to the conclusion that he had a writ of summons which at that period would alone entitle him to sit in this House. The only suggestion consistent with his having sat in this House at all without a summons would be his having intruded himself into the House without authority. . . . The

question is, whether your Lordships are to presume that he was there without that legal authority, or whether, connected with other collateral facts of a summons at an earlier period and summonses at subsequent periods, your Lordships may not safely come to the conclusion that he was summoned at that time upon the principle of law 'omnia presumuntur legitime facta donec probetur in contrarium.' I apprehend your Lordships may do what you have done on former occasions—presume upon the collateral evidence in this case that that took place which alone could justify the sitting, namely, that Sir John de Hastings was summoned to Parliament in 18 Edw. I." A resolution, based on this reasoning, was agreed to by the Committee, reported to the House, and adopted, and the Queen acted thereon.

Lastly, in 1877, after several intervening cases, it was held that the **Mowbray** Mowbray barony. barony was created by summons and sitting in 11 Edw. I., and that the claimant was one of the co-heirs, and shortly afterwards the abeyance was determined by the Crown in his favour.

Thus, then, the law has been finally and conclusively settled by repeated decision, and it is futile now to follow Prynne, Elsyng and others in their attempts to show that the law might have been differently settled.

To make the rule in the *Clifton Peerage Case* (*supra*, p. 39) applicable it is essential that a sitting shall be proved under the writ of summons relied on as creating the barony. This was, as we have seen *supra*, p. 38, laid down by Lord Coke. But the point was subsequently raised in the *Freschville Peerage Case* (1677). In that case Lord Freschville, who had been created a baron by letters patent of 16 Car. II., having taken his seat under that creation, claimed to be also entitled to a still more ancient peerage of the same name, as heir general of the body of one Ralph de Freschville, of Staveley. This Ralph de Freschville had had a summons to Parliament among the barons of the realm in 25 Edw. I., but no proof was forthcoming that he had ever sat in Parliament, or that any of his descendants had sat, and the House, on March 6th, 1677, without making any examination of the title tendered by Lord Freschville, resolved that they did not find sufficient grounds to advise his Majesty to allow the claim of the petitioner. Proof of sitting.

The *De Lisle Case*, reported by Sir H. Nicholas, p. 28, is another instance illustrating the necessity of sitting in pursuance of a summons perfecting a title to barony by writ. In this case there was proof of a summons to Gerard de Lisle in 31 Edw. III., and also of fourteen summonses to his son and heir, but there was no proof of any sitting, and the House of Lords held that in the absence of evidence of a sitting pursuant to the writ, the claimant, who claimed title through a daughter and heiress of the son, had not made out his claim.

The House thus, in effect, negated the suggestion by the Redesdale Committee (third Report, p. 27) that a sitting might be inferred where proof was given of a succession of writs.

This rule, that the records of Parliament are the proper and only evidence of a sitting in Parliament, is one which was laid down by Lord Coke, and has been recognized ever since.

Evidence of sittings.

From the first year of Henry VIII. downwards, the Journals of the House of Lords, with a gap of eighteen years (the Journals of which have been lost), show the names of the peers present from day to day, and so render it easy to prove a sitting where there has been one. But in regard to sittings prior to 1 Hen. VIII., it is very much a matter of chance whether any record is forthcoming, for no regular list of the peers attending the House was then entered in the Rolls of Parliament, and the presence of a peer is only incidentally disclosed when, for example, he is named as one of the triers of petitions, or as a witness to some transaction in Parliament, or as having been appointed mainpernor or bail for persons accused in Parliament, or as having taken part in some ceremony in Parliament, or some resolution or other proceeding in Parliament.

In the *Botetourt Case*, 1764 (see Appendix to the *De Lisle Peerage Case* by Nicholas, p. 309), the report states that the evidence tendered in proof of a sitting in 33 Edw. I. was an entry in the Close Rolls, but the Committee, after some discussion, refused to receive the entry in evidence on the grounds (1) that it was not written on the Close Rolls but affixed or tacked to it, (2) that it was written in a different hand, and the parchment was not of the same size as the Roll. The counsel for the petitioner thereupon proved a sitting by producing the Roll of 50 Edw. III., from which it appeared that John, the second Lord Botetourt, was one of the mainpernors of Parliament in that year before Lord Latimer. This was received.

As to Creation by Act of Parliament.

Creation by Act.

Peerage by Act of Parliament is a well-recognized mode of creation. In such cases the Act has generally been framed as a Royal charter, expressed to be made with the assent of Parliament (see, for example, App. No. 34), but the creation is none the less an Act of Parliament because thus expressed as a charter of the King, made with the assent of Parliament, or with words sufficient to evidence that assent. Many early Acts of Parliament take the form of a charter, notably, for example, *Magna Charta*.

Nor does the fact of such a parliamentary charter not being entered on the Parliament rolls and printed with the Statutes deprive it of its proper operation. The charter has been upheld as an Act of Parlia-

ment, even where it was not clear from the record that the several estates had all concurred in their assent. The leading case as to statutory charters is the *Prince's Case*, reported in 8 Coke's Reports, p. 1.

In that case the question at issue was whether a charter of 11 Edw. III., granting the Dukedom of Cornwall to the King's son, was or was not an Act of Parliament. The charter granted the dukedom and extensive lands with it to the Prince "habendum et tenendum eidem duci et ipsius et heredum suorum Regum Angliæ filiis primogenetis et dicti loci ducibus in regno Angliæ hereditarie successuris," and it purported to annex the lands granted to the dukedom. The charter was expressed to be granted "De communis assensu et consilio prelatorum, comitum, baronum et aliorum de consilio nostro in presenti Parlamento." It was dated at the foot and expressed to be signed "Per ipsum Regem et totum consilium in Parlamento." The case was argued many times; on the first occasion by Stephens, the Prince's attorney, for the King, and by Heron, sergeant, for the defendants; on another day by Doderidge, the King's solicitor, and by Houghton, sergeant, for the defendants, and lastly by Hobart, the King's Attorney-General, and again in the same term, argued by Williams and the Chief Baron, and afterwards by the Chief Justice of the Common Pleas and the Lord Chancellor. And the report states that as to the first point it was unanimously adjudged by the Lord Chancellor and the said justices that the charter in question *was* made by the authority of Parliament, and the Court rested their opinion upon certain reasons: first, that it would be impossible, if the said charter was not established by Parliament, that the estate either of the honour to be Duke of Cornwall, or of the possessions thereof being limited in such special manner as it is, should be sufficient in law; seeing that the course of inheritance indicated was a course of inheritance against the rules of the common law, and could not be granted by charter without the force and strength of an Act of Parliament; and secondly, that the possessions could not be annexed in the manner obviously intended, unless the instrument took effect as an Act of Parliament. The second reason was *ex absurdo* that six others being created earls at the same time, for the honour of the Prince their creations and donations should be firm and good in law to some of them and the heirs of their bodies, and to others in fee simple, and that the creation of the Prince himself, and of such a most noble Prince, and the grant to him of the said castles, manors, &c., should be either void in law or but an estate at will, and especially in such a time when the judges, who always attended in Parliament, were the most wise and learned in the law; and thirdly, that in various subsequent grants, judgments, and resolutions in Parliament and else-

The Prince's Case (Dukedom of Cornwall).

where that charter had always been treated as having a statutory operation.

These reasons have been accepted as sound, and the Redesdale Committee in their third Report, at p. 128, say that "from the time of this grant the dignity of Duke of Cornwall has been considered vested in the eldest son of the King by force of this patent under the authority of Parliament, though the patent purports to be made only 'de communi assensu et concilio prelatorum comitum baronum et aliorum de concilio nostro in presenti parlamenti,'" and say nothing about the concurrence of the Commons, who must therefore be treated as comprised in the words "aliorum de concilio." (See further on the case, *infra*, p. 52.)

Earldom of
Oxford.

A similar question to that in the *Prince's Case* arose in the case of the Earldom of Oxford, decided in 1625 (Collins, Claims, 173).

Under a charter of 16 Rich. II. (R. C. V. 109), the forfeited Earldom of Oxford was expressed to be restored and to be limited, with the assent of Parliament, to Aubrey de Vere and his heirs male for ever. The claim was made by the heir male of the party restored, and the point was whether the charter of restoration so made operated as an Act of Parliament, the importance of the point lying in the fact that if the charter was not an Act of Parliament, the limitations under it were void as contravening the common law.

The words of assent, "de assensu Parlamenti nostri," were clear, though the charter itself was not entered in the Parliament Rolls, but only a memorandum (see *infra*, p. 264) recording the transaction. The House of Lords referred the question to the judges, and Chief Justice Crewe delivered the opinion of himself and the other judges, Dodridge, Yelverton and Trevor, to the effect that the charter did operate as an Act of Parliament, and that being so it validated the estate to the heirs male which would otherwise be void. "There appears," said Lord Chelmsford, in the *Wiltes Peerage Claim* (L. R. 4 H. L. 126, 155), "to be good ground for the judges having advised the House, and for the House having held that the proceeding in 16 Rich. II. was an Act of Parliament." The Roll, after stating the grant of the title, estate and honour to Aubrey de Vere, proceeds: "And presently the said Earl did homage to our said Lord the King, and then was taken and placed in his seat with his peers in Parliament." The charter to Aubrey de Vere, which was not granted till three weeks afterwards, recites the proceedings in Parliament and expressly states that the earldom was granted with the assent of Parliament.

There have been several subsequent cases in which charters have been held to operate as Acts of Parliament.

Islington Case. One is the *Islington Market Bill*, 1835 (3 Cl. & Fin. 513). In that

case the question was whether the charter of Edward III. operated as an Act of Parliament. The words relied on were "de assensu prelatorum comitum baronum ac totius communitatis regni instanti parlamento apud Westmonasterium," and they were held sufficient to give to the instrument statutory operation.

Another case is the *Great Eastern Rail. Co. v. Goldsmid*, 9 App. Cas. 927. There a charter of 1 Edw. III., made by the King with the assent of the prelates, earls, barons, and all the Commons of our realm assembled in our present Parliament, granted certain privileges to the Corporation of London, and the charter ended with the words, "By the King himself and the whole council of Parliament."

Charter of
Edward III.
to Corporation
of London.

The House of Lords considered that the charter was an Act of Parliament. Lord Selborne, L. C., considered the House should follow the *Prince's Case*, *supra*, p. 47. Lord Fitzgerald said: "I concur in opinion with the Lord Chancellor that the charter of Edward III., though not to be found on the statute roll, was granted by the Crown with the full assent of Parliament, and has the full effect and operation of a private Act of Parliament. The form of the instrument, its language differing so essentially from the ordinary grant from the Crown, and its conclusion, all point to its true character being that of an Act of Parliament and not a mere charter . . . Of the three instances which we have before us of charters, one being the Prince's charter, all occurring within a not very great length of time of each other, it is curious to observe that none of the three appears upon the statute roll. That only shows that there were Acts of Parliament at that period recognized as Acts of Parliament which do not appear at all upon the statute roll."

The following is a summary of the cases between 11 Edw. III. and 11 Hen. VI., in which peerages have been granted by charter containing words of assent more or less similar to those above given.

Summary of
cases where
charters
granted
(11 Edw. III.
to 11
Hen. VI.).

Earldom of Huntingdon, 11 Edw. III. "De communi assensu et consilio prelatorum, comitum, baronum et aliorum de consilio nostro in presenti parlamento nostro apud Westmonasterium . . . existentium" (and signed) "per ipsum regem et consilium in pleno parlamento."

Earldom of Northampton, 11 Edw. III. Expressed to be passed "ad requisitionem prelatorum et procerum et communitatis regni nostri in presenti parlamento . . . de definito dicti parlamenti" (and signed) "Dat. Per manum nostram apud Westmonasterium per ipsum regem."

Earldom of Derby, 11 Edw. III., ditto.

Earldom of Suffolk, 11 Edw. III. "De communi assensu et consilio prelatorum, comitum, baronum et aliorum de consilio nostro in presenti

P.

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parlamento. . . . Dat. Per ipsum regem et consilium in parlamento."

Earldom of Salisbury, 11 Edw. III. "Ad requisitionem prelatorum et procerum ac communitatis regni nostri in instanti parlamento nostro . . . de definito dicti parlamenti. . . . Dat. Per ipsum regem et totum consilium in parlamento."

Dukedom of Cornwall, 11 Edw. III. "De communi assensu et consilio prelatorum, comitum, baronum et aliorum de consilio nostro in presenti parlamento nostro. . . . Dat. Per ipsum regem et totum consilium in parlamento."

Prince of Wales, 17 Edw. III. "De consilio itaque et consensu prelatorum, comitum, baronum et communitatum regni nostri Angliæ in presenti parlamento. . . . Dat. &c. Per ipsum regem."

Dukedom of Lancaster, 25 Edw. III. "De assensu prelatorum et procerum in instanti parlamento nostro . . ."

Dukedom of Cornwall, 49 Edw. III. "De consilio et assensu prelatorum, ducum, comitum et baronum. . . . Dat. &c. Per ipsum regem."

Dukedom of York, 9 Rich. II. Charter on the Rolls of Parliament ratified "in pleno parlamento presentibus prelatiis proceribus et magnatis ac tota communitate."

Dukedom of Gloucester, 9 Rich. II. This was ratified as above in "pleno parlamento."

Marquisate of Dublin, 9 Rich. II. Ratified in "pleno parlamento," as above.

Duke of Ireland, 9 Rich. II. "De assensu prelatorum, ducum et aliorum procerum ac communitatis regni nostri. . . . Dat. . . . Per ipsum regem in parlamento."

Earldom of Huntingdon (John Holland), 11 Rich. II. "De assensu (as above). Dat. &c. Per manum nostram apud, &c. Per ipsum regem et consilium in parlamento."

Earldom of Rutland (during the life of grantee's father), 13 Rich. II. "De assensu, &c. (as above). Dat. &c."

Earldom of Buckingham, 14 Rich. II., R. C. V. 89, fee simple, annuity ditto. "De assensu et consilio omnium prelatorum, magnatum et procerum regni nostri Angliæ et aliorum de consilio nostro in presenti parlamento nostro apud, &c., existentium necnon ad specialem requisitionem et de assensu totius communitatis ejusdem regni nostri in parlamento nostro predicto similiter existentium."

Earldom of Oxford (restitution), 16 Rich. II., heirs male, R. C. V. 109. "De assensu predicto [*i.e.*, instantis parlamenti] restituimus, dedimus et concessimus ac per presentis damus," &c. Rot. Cart. 16 Rich. II.

Earl Marshal, 20 Rich. II., tail male, R. C. V. 112. "In presenti parlamento concessimus. Dat. &c. Per ipsum regem in parlamento."

Earldom of Somerset, 20 Rich. II., tail male, annuity ditto, R. C. V. 115. "In presenti parlamento nostro preficimus et creamus. . . . Per ipsum regem in parlamento."

Marquisate of Somerset, 20 Rich II., tail male, annuity ditto, R. C. V. 115, ditto.

Earldom of Wiltes, 21 Rich. II., heirs male for ever, annuity ditto, R. C. V. 117. "In presenti parlamento nostro preficimus. . . . Per ipsum regem in parlamento."

Dukedom of Hereford, 21 Rich. II., tail male, annuity ditto, R. C. V. 118. "De assensu prelatorum, ducum, magnatum et aliorum procerum et communitatis regni nostri Angliæ in instanti parlamento. . . . Per ipsum regem in parlamento."

Dukedom of Surrey, ditto, ditto.

Dukedom of Exeter, ditto, ditto.

Dukedom of Albemarle, ditto, ditto.

Dukedom of Norfolk, ditto, ditto.

Earldom of Gloucester, 21 Rich. II., tail male, annuity ditto. "In presenti parlamento. . . . Per ipsum regem in parlamento."

Earldom of Westmoreland, ditto, ditto.

Earldom of Worcester, ditto, ditto.

Prince of Wales, 1 Hen. IV., him and his heirs Kings of England, R. C. V. 129. "Consilio et assensu prelatorum, ducum, comitum, baronum et communitatum regni nostri Angliæ in presenti parlamento," &c.

Dukedom of Lancaster, 1 Hen. IV. "De ladvis et assent des toutz les seigneurs espirituelx et temporelx et de les communes."

Dukedom of Bedford, 2 Hen. V., for life, annuity ditto, R. C. V. 171. "Assensu prelatorum et procerum ac communitatis regni."

Earldom of Pembroke, ditto, ditto.

Dukedom of Gloucester, ditto, ditto.

Dukedom of Bedford and Earldom of Kendal, 1 Hen. VI., for life, R. C. V. 196. "Assensu prelatorum et procerum ac communitatis regni."

Barony of Faunhope, 11 Hen. VI., life peerage, nothing about heirs, R. C. V. 213. "(In trium statuum ejusdem parlamenti presencia) . . . ac de avisamento et assensu illustris principis domini ducis Gloucestri . . . ac certorum dominorum spiritualium et temporalium in parlamento," &c.

Earldom and Dukedom of Gloucester (restoration), 11 Hen. VI., tail male, annuity ditto, R. C. V. 224. "De avisamento et assensu dominorum spiritualium et temporalium ac communitatis regni. . . . Per ipsum regem et consilium in parlamento."

Some charters and patents are signed "auctoritate parlamenti," but "Auctoritate these words in charters after 18 Hen. VI. appear to refer to the parlamenti."

statute 18 Hen. VI. c. 1 (1439), which directed that patents were to bear date in accordance with the royal warrants entered in Chancery, and not to bear date before in any wise.

Concurrence
of the three
estates of the
realm in
passing Act of
Parliament.
*The Prince's
Case.*

In the *Prince's Case* (*supra*, p. 47), it was said "if an Act of Parliament be penned 'By assent of the King and of the Lords spiritual and temporal and of the Commons, or it is enacted by authority of Parliament,' it is a good Act, but the most usual way is that it is enacted by the King by the assent of the Lords spiritual and temporal and of the Commons. . . . But if an Act be penned that 'The King, with the assent of the Lords,' or 'with the assent of the Commons,' it is no Act of Parliament, for three ought to assent to it, *scil.*, 'the King, the Lords, and the Commons,' or otherwise it is not an Act of Parliament. And by the record of the Act it is expressed which of them gave their assent, and that excludes all other intendments that any gave their assent. And so there is a difference between a general and a particular penning of an Act of Parliament. . . . And at this very Parliament, 11 Edw. III., Henry, son of Henry, Earl of Lancaster, was created by charter, 'Ad requisitionem prelatorum et procerum et communitatis regni nostri in instante parlamento nostro,' to be Earl of Derby to him and the heirs male of his body."

Expressions
in charters
as to assent of
Parliament.

"Also by another charter the King created William de Bohun, 'de communi assensu prelatorum comitum, baronum et aliorum de consilio nostro in presenti parlamento,' Earl of Northampton to him and the heirs of his body. And at the same Parliament he, by charter, created Hugh de Audley Earl of Gloucester 'de definito dicti parlamenti nostri concilio.' And by charters with the like words the King at the same time created William de Clynton Earl of Huntingdon in tail, Robert de Ufford Earl of Suffolk in fee simple, William de Monte Acuto Earl of Salisbury in fee simple; and all these were creations with donations of lands, 'ad sustinendum nomen et onus,' by authority of Parliament in form of the King's charter, with the conclusion of 'hiis testibus,' and some with such subscription 'per regem et consilium in parlamento,' and some 'per regem et consilium in pleno parlamento,' and others 'per ipsum regem et totum consilium in parlamento,' all which are of one and the same effect."

Sir Matthew
Hale's
opinion.

There are some useful observations in regard to the matter in Sir Matthew Hale's "Jurisdiction of the Lords," at p. 17. He says: "When things are said to be done 'de communi consilio in parlamento' it seems to me always to be intended with the express consent of both Houses in conjunction with the King. When things are said to be done 'in pleno parlamento' it is always intended that it is done where the King and both Houses are present, or, at least, where both Houses are present. Although when a thing is recorded to be done 'coram consilio in parlamento,' or in 'curia parlamenti,' it is often

intended of the House of Lords, yet a thing recorded to be transacted or done 'per totum consilium parliamentum' is intended of both Houses. Where a thing is said to be done 'ex assensu parliamenti,' or 'ex auctoritate parliamenti,' it is intended to include the assent of both Houses."

Again, at p. 21, Hale says: "Those styles that in propriety take not in the whole Parliament, but which in propriety are applicable to the King alone, or to the King and his *consilium ordinarium*, or to the King and the House of Lords, yet in truth are appropriate to acts or grants in Parliament made by the King and both Houses, and are true Acts of Parliament (*vide* 11 Hen. VII. 27), upon all which it appears how difficult it is, barely by styles and titleings of records of Parliament, to conclude whether the things were transacted by one or both Houses, or per *consilium ordinarium* only, and, therefore, it is necessary in such cases to observe the whole record, the nature of the business so transacted, and the whole circumstances of the case. And the constant interpretation excludes all usage of succeeding times to give a true conclusion whether the thing were transacted or assented to by both Houses, or only by the Lords' House, or the *consilium ordinarium*."

Sometimes a patent concludes with the words "per breve de privato sigillo et de data predicta auctoritate parliamenti." These words, however, are not considered to import that the patent is granted with the authority of Parliament, but that it conforms to the Act of 18 Hen. VI. c. 1, which directed that patents should bear the date in accordance with the royal warrant delivered into the Chancery, and should not bear date before in any wise. The words first occur shortly after the Act. See, for example, patents in 19 & 20 Hen. VI. (See R. C. Vol. 5, pp. 235, 236.)

Date of
letters patent.

The Redesdale Committee seem to have overlooked the Act above mentioned, for at p. 218 of their third Report they are only able to explain the words by reference to 27 Hen. VIII. c. 11.

Besides charters operating as Acts of Parliament there are a few cases in which peerages have been granted or restored by Acts of Parliament in the usual form. For example, the Act of 1 Edw. VI., enacting that John Lumley and the heirs male of his body should have the dignity of a baron of the realm, and that he should be restored, not only in blood, as son and heir of George Lumley. This was held to create a new peerage. (Redesdale Committee, 4th Rep. p. 286; and see Collins' Claims, p. 373.)

Grants or
restoration of
peerages by
Acts of Parlia-
ment in the
usual form.

There have also been cases in which Parliament has confirmed a peerage granted by the Crown, as, for example, the Lucas peerage, which was granted in 15 Car. II., with limitations not in accordance with the common law. This, in the same year, was ratified and con-

Limitation
not in accord-
ance with
common law.

firmed by a private Act of Parliament. (See Hatsell's Precedents, Vol. 2, App. B.; Redesdale Committee, 3rd Rep. p. 30.) This peerage was claimed and allowed by the House of Lords, 4 June, 1907.

The Form of Charters and Letters Patent.

- Stephen and Maud. The charter of Stephen creating the Earldom of Hereford, the charter of Maud, the Empress, confirming or recording that earldom, and the charter creating the Earldom of Gloucester, which are the earliest peerage charters known, are expressed in short and simple language. (See translations of these charters, *infra*, pp. 241, 242.)
- Hen. II. The charters next in time are those of Henry II. Specimens of these are given at pp. 243, 244. They do not in substance differ from the earlier charters, but the investiture by girding with the sword and the grant of the third penny of the fees of the county are emphasized. Both these features—investiture and money grant—appear in the charters of subsequent reigns with occasional modifications.
- Hen. III. Specimens of the charters of Henry III. will be found at pp. 246 and 247.
- Edw. I.
Edw. II. In the charters of Edward I. and Edward II. a change is perceptible, those of Edward II. commencing—after the fashion of the foreign charters of the period—with a preamble reciting the reasons why the King has thought fit to confer the dignity in question on the particular person.
- Grants in fee or tail. The earlier charters of peerage all grant or record the grant of a fee simple as the estate of inheritance in the dignity, but in the time of Edward II. we begin to find a new form of limitation grants in tail to a man and the heirs of his body, and this practice once begun quickly grew in favour.
- Edw. III. With the reign of Edward III. the development continues. Charters become more elaborate in form and more grandiloquent in language. In this reign, also, dukedoms are first granted, and the practice begins of granting charters in Parliament with the consent of Parliament, and so giving to them or some of them a statutory operation. (See *supra*, p. 49.) We find, too, in this reign limitations varying considerably. Some are in fee simple, some in tail general, some in tail male, and some in tail special.
- Rich. II. In the reign of Richard II. the charters grow still more elaborate, while the limitations continue to be as varied. Some charters are granted in Parliament; some are not. A new order—that of marquises—appears.
- Hen. IV.-VI. The charters of Henry IV.—VI. have little worthy of remark except the prolixity of their preambles, but the reign of Henry VI. is memorable as that in which the first barony by patent was granted.

This was the commencement of a practice which was destined eventually to supersede all other modes of granting peerages, whether by oral declaration, by charter, or by writ and sitting.

In subsequent reigns the forms of peerage charters and patents continue to grow in length and elaboration, but with the nineteenth century came a change in favour of a form of greater simplicity, as appears from the patents set out in the Appendix.

Modern forms
of charters
and patents.

The oldest charters, with few exceptions, merely place on record the fact that the Crown has granted a peerage, indicate the limitations, and close with the common clause emphasizing the Crown's desire that the peerage shall be enjoyed in accordance with the limitation expressed. This clause usually began with the words *quare volumus*. In one instance, however, the charter is not a mere record, but purported to be an actual grant of a peerage. (See *infra*, p. 242.)

Later on charters creating earldoms merely refer to the grant of the third penny, and appear to treat this as in some way equivalent to a grant of the peerage. (See *infra*, pp. 243, 245.) Such a mode of creation did not last long. The words reciting the investiture of an earl by girding with a sword first appear in the charters of Edward II.; they remained part of the customary formula for many centuries. With the charters of the time of Edward III. and Richard II. lengthy preambles and special limitations came into vogue, and these are found increasing in elaboration under the Henries IV., V. and VI.

Charters and patents often contain clauses apparently superfluous, but really formal or declaratory. The *quare volumus*, already referred to, is one of these. So are the clauses in use since Henry VI.'s time, and still inserted in modern patents, granting to the patentee the right to be called and styled and reputed as a peer by the name mentioned in the patent, and to have a seat and place and voice in Parliament and elsewhere.

Sometimes a clause appears in a charter which obviously has reference to a statute, and must be read in connection therewith. Thus, by 1 Hen. IV. c. 6 (1399), it was enacted to the intent that the King should not be deceived in his grants or gifts, annual or in fee, or in any office, or if they should thenceforth demand of the King any lands, tenements, rents, offices, annuities or other profits, should make express mention in their petition of the value of the thing so demanded, and also of that which they have had of the King's gift or of other his progenitors or predecessors before, otherwise the letters patent to be void.

Statutory
condition for
voiding patent
for deception.

Apparently before long this statute was found irksome, and accordingly, acting on the assumption that it was merely for the King's protection, and therefore that he could waive the disclosure required

Provision
waiving
statute.

by the statute, a clause was commonly inserted in petitions for grants and in the letters patent and charters, thereby waiving compliance with the statute. Thus, in the patent creating the Barony of Beaumont in 18 Hen. VI. (R. C. V. 235), the patent, after granting the peerage and an annuity, concluded with the words: "Eo quod expressa mencio de aliis donis et concessionibus eidem Johanne per nos ante hac tempora factis nec de valore eorumdem juxta formam statuti inde editi et provisi in presentibus minime facta existet non obstante."

This clause, with more or less variation, soon came into general use, and remained in use for several centuries.

Again, as to the meaning of the words "auctoritate parlamenti" at the conclusion of a charter or patent, see *supra*, p. 51.

As to the reference to the third penny in grants of earldoms, see *supra*, p. 34.

As to reference to girding and investiture, see *supra*, p. 33, and *infra*, p. 57.

Whether any dignity above a barony created by writ.

Has any dignity, except that of barony, been created by writ?

There is no recorded case of a dignity above that of barony having been created by mere writ and sitting.

From the time of Edward I. a dignity above that of barony has always been created, or the creation evidenced, by charter or patent or by investiture, *e.g.*, girding; and there has always, or almost always, been some record of the limitations of the dignity.

A mere writ and sitting might possibly be sufficient to found a presumption of a higher existing dignity having been duly created by investiture or patent.

At the present day, and as regards the past, the dearth of any evidence of a dignity, other than that of barony, having been created by summons and sitting, is significant, if not conclusive, against such creations having taken place.

Effect of invalid grant where summons and sitting, *query*.

A case, the converse of those just discussed, presents rather more difficulty. Suppose a patent invalidly granted, and that the grantee is summoned and sits in Parliament; does that create, or has that in the past created, a peerage in him and his heirs or the heirs of his body? In the *Wensleydale Peerage Case* (5 H. L. C. 958), this point did not arise, for the patent was laid on the table. (See also *Norfolk Case*, (1907) A. C. 10.)

Investiture Generally.

The girding in the case of dukes.

As appears above (p. 33), the grantee of an earldom was usually given investiture of his earldom by girding. The same ceremony seems to have been adopted in the investiture of other dignities—

dukedoms and marquisates, for instance. Thus, in 11 Edw. III. the King, creating his son Duke of Cornwall, uses the words, "*et gladio cinximus secut decet*"; and a few years later (25 Edw. III.), in creating Henry, Earl of Lancaster, Duke of Lancaster, the creation is followed by the words, "*et ipsum de nomine ducis dicti loci per cincturem gladii presenciabiles investimus.*"

So when his grandson, Richard II., created his uncle Edmund Duke of York, though the charter says nothing about girding, the Parliament Rolls do, and they record the ceremony thus: "*Ipsaque ducem de predicto titulo nomine et honore per gladii cincturam et pillei ac circuli aurei suo capiti impositionem maturius investivit ac cartam predictam in plenum testimonium perpetuam que memoriam et fidem premissorum, manibus suis propriis eidem ducis tradidit et realiter liberavit. Et capto immediate ejus homagio pro ducatu predicto cum vultu hilari inter pares parlamenti in gradu celsiori sedere mandavit quod idem dux gestancius incontinenti fecit.*" See also the investiture of the Duke of Gloucester, solemnized in like manner at the same time. (V. 65.)

The making of John de Beaufort Marquis of Somerset (21 Rich. II.) is marked with the same ceremony: "*Et cum de stilo titulo ac nomine et honore marchionis loci predicti per cincturam gladii investimus habentum,*" &c.

It will be enough to add a few more instances. They go to show that the ceremony of investiture was becoming more elaborate as time went on. Golden coronets, rings, wands, &c. are added to the simple rite of girding. Thus, in 21 Rich. II., Henry, Earl of Derby, was created Duke of Hereford with these words: "*In ducem Herefordiæ cum titulo stilo ac nomine et honore eidem debitis prefecimus ac inde ibi presentialiter per appositionem cappe suo capiti ac traditionem virgæ aureæ investimus.*"

In the charter of 1 Hen. IV., creating the King's son Prince of Wales and Duke of Cornwall and Earl of Chester, the words are: "*Per sertum in capite et annulum in digito aurea et virgam auream investimus.*"

When Edward IV. created his brother Richard Duke of Gloucester the words used are: "*In ducatu illo cingendo sibi gladium ac per appositionem cappe capiti suo investivimus ut est moris.*"

In Edward IV.'s creation of the Marquisate of Montagu, the words V. 370. used are: "*Per cincturam gladii insignimus ac unam capam honoris et dignitatis super caput suum imponimus.*"

Whether in the case of baronies there was any ceremony by investiture is in doubt. (See Cruise, p. 75.) The earliest patents conferring baronies say nothing about investiture.

Investiture in case of baronies.

Modern patents always contain a clause dispensing with investiture.

Dispensing with investiture.

Date of
peerage.

From what date does the creation of a peerage take effect?

1. In the case of baronies by writ, the creation dates from the time when the person summoned takes his seat in Parliament as a temporal peer, such sitting, under the authorities above cited, perfecting the title.

2. In the case of peerages created by charter or patent, the creation takes effect from the date of the charter or patent, and if no date be fixed then from the execution of the charter or patent. (*Infra*, p. 64.)

If the charter or patent does not create but only records a creation, as was often the case in the old peerage grants, the time of the creation resolves itself into a question of fact, that is, the time at which the parol creation or investiture took place.

CHAPTER V.

CONSTRUCTION AND INTERPRETATION OF CHARTERS AND LETTERS PATENT.

THE construction or interpretation of Royal Charters or letters patent of the Crown, creating or recording the creation of peerages, is governed by the same principles and general rules as govern the construction or interpretation of all written instruments, subject, however, to certain qualifications due to the fact of peerage grants being an exercise of the prerogative of the Crown. What rules apply.

The object of all interpretation is to ascertain the intention as expressed by the words used in the instrument, and in order to do this it is a primary rule that the whole instrument must be looked at and read together.

If the words used are clear no more is necessary to ascertain the intention; if, on the other hand, the words are not clear, or if any word, clause, or expression is equivocal or ambiguous or of doubtful import, it is for the interpreter to determine what is the true meaning of the terms used. Ordinary words must be read *prima facie* in their popular sense; technical or scientific terms must be read in their technical sense; words in an ancient document in the sense they bore at the date of the document.

If the words or any of them are ambiguous or equivocal, that construction must be adopted most in accordance with what appears to be the general intention of the author of the instrument as expressed therein. Ambiguity.

These general rules are well summed up by the judges in *Shaw v. Wilson*, 1842 (9 Cl. & Fin. 355), who also explain when extrinsic evidence is admissible to interpret an instrument. *Shaw v. Wilson.*

"It is unquestionable," said Coleridge, J., "that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention, and I believe the authorities to be too numerous and clear to make it convenient or necessary to cite them. Where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the

context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken conclusively to be that in which the writer used it; such meaning, in that case, conclusively states the writer's intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule as I state it requires, perhaps, two explanatory observations; the first is that if the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning; the second, that by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable is what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning. . . .

"This rule, thus explained, implies that it is not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used import."

"I apprehend," says Baron Parke in the same case, "that there are two descriptions of evidence, the only two which bear upon the subject of the present inquiry, and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument and to apply it practically. In the first place, there is no doubt that, not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical words and peculiar terms, or, indeed, any expressions are used which at the time the instrument was written had acquired any appropriate meaning, either generally or by local custom, or among particular classes."

And Tyndal, C. J., adds: "The general rule, I take it to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words used; and that in such case evidence *dehors* the instrument for the purpose of explaining it according to the surmise or alleged intention of the parties to the instrument is utterly inadmissible. . . . The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party *at the time it was made*, it has

always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises on the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself, for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."

"In construing such an instrument you may look to the usage, see in what sense the words were used at the time; you may look to contemporaneous documents, as well as to Acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed; but to admit evidence to show the sense in which words were used by particular individuals is contrary to sound principle." (Per Lord Campbell, *Drummond v. Att.-Gen. for Ireland*, 2 H. L. C. 837.)

"To ascertain the meaning of the words used in the writing every part of it must be considered with the help of those surrounding circumstances which are admissible in evidence to explain the words and put the Court as nearly as possible in the situation of the writer of the instrument." (Per Lord Wensleydale, *Grey v. Pearson*, 6 H. L. C. 106.)

"The best mode that can be resorted to for the interpretation of charters containing dubious or obscure expressions is contemporaneous usage, for '*contemporanea expositio est fortissima in lege*,' and contemporaneous usage is always admissible for obtaining the true meaning and intention of such expressions." (See Inst. II. 136.) But whilst contemporaneous usage is available to explain a doubtful expression in a charter it cannot be used to elucidate the general terms of it (per Lawrence, J., 4 East, 333), still less to contradict it. (*Lupton School v. Scarlet*, 2 Y. & J. 330.) It is not necessary that the usage cited to explain the terms of an instrument should be a strictly contemporaneous usage. Later usage evidencing an established continuous usage is admissible. *Contemporanea expositio.*

The preamble or the recitals of an instrument in writing, such as an Act of Parliament, deed, charter, or patent, are admissible for the purpose of ascertaining the object and intention of the instrument, but they cannot be used to control or modify the words contained in the operative part of the instrument where those words are clear and unambiguous. (See *Bath and Montague's Case*, 3 Ca. Ch. 101; *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 394; *Pattison v. Banks*, Cowp. 543; *Copland v. Davies*, L. R. 5 H. L. 358.) If, however, the words of the operative part are ambiguous, then the preamble or the recitals may be referred to for the purpose of throwing light on the intention. *Preambles and recitals.*

"The reciting part of a deed," says Lord Holt (*Bath v. Montague, supra*), "is not at all a necessary thing either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation; but when it comes to limit the estate, there the deed is to have its effect according to what limitations are therein set forth, and that is plain and full without any manner of contradiction whatsoever." (Per Holt, C. J., *Bath and Montague's Case, ubi supra*.)

"The rule," said Jessel, M. R. (*Dawes v. Wedwell*, 18 Ch. D. 358), "is that a recital does not control the operative part of a deed where the operative part is clear." (See *Howard v. Earl of Shrewsbury*, L. R. 17 Eq. 394.)

Special rules
in favour of
the Crown.

The above rules are rules of general application. There are, besides these, a series of rules equally necessary to be borne in mind relating specially to the interpretation of Crown grants, and evidencing historically the special favour shown to the prerogative of the Crown in old days.

"The ordinary construction is that the words of an instrument shall be taken most strictly against the party employing them—'verba chartarum fortius accipiuntur contra proferentem'; but this rule does not apply to the Crown. Where a question arises on the construction of a grant from the Crown, the rule is reversed; for such grant is construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words." (*Rex v. Mayor of London*, 1 Cr. M. & R. 12, 15, and the cases there cited.)

Construction
to lean in
favour of
Crown.

"It is established on the best authority," says the Court in *Feather v. Reg.* (6 B. & S. 283), "that in construing grants from the Crown a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another every intentment is to be made against the grantor and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown the opposite rule of construction prevails. Nothing passes except that which is expressed or which is matter of necessary and unavoidable intentment, in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown."

According to Viner, where the charter may be taken of two intents, each of which is good and effectual, in many cases it shall be taken of such intent as is most beneficial to the King. (*Abr. Prerogative*, col. c, pl. 1, 11.)

The subject, to put it shortly, has no right to claim under a Crown

grant or charter anything but what the Crown has granted in clear and unequivocal terms.

So if the King be deceived in his grant it will be void, and this though the grant is made *ex certa scientia*. (9 Rep. 628 b; 1 Co. 44a, Comyn's.)

So if the King's grant be founded upon a false suggestion it will be void. (*Ibid.*)

So if the recital of a thing in a patent which sounds to the King's benefit be false the grant will be void, for the King is deceived. (*Ibid.*)

However, if the King's grant be "*ex certa scientia et mero motu*," it shall be taken more strongly against the King and beneficially to the subject; but that rule, however, must not be taken to qualify the general rule above stated, that a royal grant is to be construed most strongly against the grantee. (*Rex v. Dover*, 4 L. J. Ex. 94; 1 Cr. M. & R. 726.)

"Another general rule in the construction of charters is that such a presumption shall be made '*ut res magis valeat quam pereat*,' that is, that the object of the grant shall be attained rather than defeated. It has even been said that nothing is to be inferred from usage to cripple the grant." (Per Holroyd, J., *Rex v. Cotterill*, 1 B. & Ald. 81.) And though in general the grant of the King is to be taken most strongly against the grantee and most favourably for the King, yet when the grant is of a thing as land, to which other things are incident which are not separable, the incidents pass without being expressly named. (Year Book, 1 Hen. IV. fol. v. pl. 6.)

This rule finds expression in several ways. Thus it is an established rule in construing royal charters that if two constructions can be made of the terms, and by one construction the grant be adjudged good by the rules of law, and by the other be adjudged void, then for the King's honour and for the benefit of the subject such construction shall be made that the King's charter shall take effect, for it was not the King's intent to make a void grant (*Case of St. Saviour's, &c.*, 10 Rep. 66 b), and the King's charter is not only to be good; it is to be liberally interpreted.

"Here is an excellent rule," says Coke (Inst. II. p. 496), "for construction of the King's letters patent not only of liberties, but of lands, tenements, and other things which he may lawfully grant, that they have no strict or narrow interpretation for the overthrowing of them, '*sed secundum earundem plenitudinem judicentur*,' that is, to have a liberal and favourable construction for the making of them available in law for the honour of the King.

"Also hereby is implied that they are to be construed '*secundum earundem plenitudinem*,' that is, as fully and beneficially as the law was taken at that time when they were made, and certainly these

ancient laws were directions to the sages of the law for the construction of the King's charters and letters patent as it appeareth in our books."

But this liberality in the construction of the King's charter is always subject to the fundamental principle that the charter shall not in any respect alter the existing law of the land (*Loge's Case*, 9 Rep. 125), and therefore all expressions must, if possible, be so interpreted as to consist with the law, and no *non-obstante* clause in a royal charter can be of any effect to override such law. (*Prince Henry's Case*, 8 Rep. 29 b.) This rule of conformity with the law is abundantly illustrated in the limitations of patents, which have always been treated as void where they transgressed the limits allowed by law.

Date of
charter.

Finally there is the rule laid down in *Ludford v. Gretton* (Plowden, 490), that the King's charter hath always relation to the time of the date, and therefore it cannot be alleged that a charter was made or delivered on another day than that of the date.

Technical
terms rule as
to further
consideration.

The rules of interpretation above stated are applicable and constantly applied to the construction and interpretation of peerage charters and patents, as appears below. One of them, that technical terms must be read in their technical sense, calls for somewhat fuller consideration.

There are frequently found in use in peerage charters and grants since Norman times certain technical expressions; for example, a grant—

Heirs, &c.

To A. and his heirs: "*Hereditus suis.*"

To A. and the heirs of his body: "*Hereditus de corpore suo exeuntibus.*"

To A. and the heirs male of his body: "*Hereditus masculus de corpore suo exeuntibus.*"

Each of these expressions has, and for many centuries has had, a well understood meaning when used in relation to the grant of a hereditament. They were, and are, words of limitation defining the quantum or extent of the estate granted, and the lines on which the hereditament is to travel in its descent; in other words, they are legal limitations with a proper technical meaning; and if, in construing any particular charter or letters patent, it is sought to displace this meaning, the onus of proof rests on those who seek to attach to the words another meaning. *Prima facie* the technical meaning is the proper meaning.

Nor can this primary technical meaning be varied by any implication not derived from the terms of the charter itself. Thus, where the grant is to A. and his heirs, and it appears that at the time the grant was made those words had a technical meaning, it is not allowable to imply words as "*of his body*" or the word "*male*" unless it is clear from the context that this is the meaning of the words used in

that particular instrument, or that at the time the charter was granted "heirs" meant "heirs of the body" or "heirs male of the body."

And there is good reason why technical words should be read in their technical sense. "The reason," says Coke, "wherefore the law is so precise to preserve certain words to create an estate of inheritance is for avoiding of uncertainty, the mother of contention. There be many words so appropriated so that they cannot be legally expressed by any other word or by any paraphrase or circumlocution."

On the same principle, a grant of a peerage to a man and his heirs male cannot be read as a grant of the peerage to him and the heirs male of his body. The words being plain, there is nothing to restrict them to the issue of a particular body, and they cannot therefore be supplemented by reading in such a restriction in the absence of a context showing clearly the words of restriction were omitted by accident or mistake, even though such a limitation to heirs male is invalid as unknown to the common law (*Willes Peerage Case*, L. R. 4 H. L. 126), unless sanctioned by Act of Parliament.

In the *Buckhurst Case* (2 Ap. Cas. 1), where a peerage was granted in tail with remainders over, and there was a proviso for the peerage shifting over if and whenever another specified dignity of a higher degree should devolve on the holder for the time being of the peerage granted, it was held by the House of Lords that the patent could not be read as creating a conditional limitation to A. (the grantee) in tail male until he succeeded to another title and then a new peerage in favour of B. in tail male, the intention of the Crown in the grant clearly being, not to create a series of peerages, but to create a single peerage and determine the mode in which that peerage should devolve, and to provide—contrary to the law—for the shifting over, from time to time, of the inheritance, on the happening of the specified events.

"Now, my Lords," said Lord Cairns in that case, "there can be no doubt as to what these words mean. They are technical words perfectly well known to the law. They are the apt and apposite words by which the shifting of an estate is produced when it is intended to shift from the first takers in consequence of the happening of some collateral event. The words are words of art as to which there can be no doubt. No lawyer would have the slightest doubt as to the construction to be given to them. If you were to place this patent in the hands of any lawyer and ask him, putting aside all rules of law as to the mode in which a peerage can be limited, What is the way in which the peerage has been attempted here to be limited? he would answer without hesitation. The way in which it is attempted to be limited is this—to go in the male line of the sons of Lady De la Warr, but so that it shall shift from time to time as each of those sons or his issue become possessed of the Earldom of De la Warr.

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Forced construction not allowed in order to validate illegal provisions.

"Well, my Lords, if that is the construction of the letters patent, the question then arises, Is that a result which can be obtained in letters patent creating a dignity?"

And the same view was taken by Lord Hatherley, who said: "Mr. Fleming brought before our consideration the rule which has been laid down with reference to the construction of instruments, namely, that if they can be so construed as to operate by way of remainder, they shall be so construed in preference to being construed as shifting or springing uses or the like. That is very true. But the moment you read this patent, you see that the whole frame and object of it is to give successive estates tail to those who are described in the series of limitations, the second, the third, and the other younger sons. And then there is an enabling clause, which enables them all exactly in the manner in which they are varied in the respective limitations, and interposed between the two is that shifting clause which I apprehend, according to the proper and reasonable construction of the instrument, we must construe as simply what it professes to be, a clause determining the previous estates in the event there mentioned, namely, the event of the holder of the Buckhurst title succeeding to the Earldom of De la Warr."

Charter purporting to re-grant an old peerage not to be construed as creating a new one.

So what purports to be a re-grant of an old peerage assumed to be in the Crown cannot be construed as a new creation.

In a recent case, the *Norfolk Peerage Claim*, (1907) A. C. 10, a charter purported to grant to the claimant's ancestor an ancient peerage which at the time of the grant was supposed to be in the Crown by virtue of a surrender. The Crown's intention undoubtedly was to re-grant the ancient peerage, and it proceeded on the assumption that a surrender thereof previously made was valid. The House of Lords held, in 1906, that the surrender was invalid, and therefore that the re-grant was invalid, and that the charter could not be treated as creating a new peerage.

Comments on the suggestions of the Redesdale Committee.

"To him and his heirs" = tail general or tail male.

Before quitting the subject of the construction of peerage grants, it may be well to refer to some suggestions on the subject made by the Redesdale Committee in their Reports. The Committee suggest:—

1. That the grant of an earldom in fee simple, that is, to A. and his heirs—"heredibus suis"—was, according to the understanding placed on the words in the twelfth, thirteenth, and fourteenth centuries, nothing but a grant to A. and the heirs of his body, or to A. and the heirs male of his body, and therefore could carry nothing to collaterals.

"To him and the heirs of his body" = last male.

Suggestions considered.

2. That the grant of an earldom to A. and the heirs of his body meant, at the same period and long afterwards, a grant to A. and the heirs male of his body. (See *infra*, p. 71.)

Taking these suggestions of the Committee *seriatim* the first of them is open to the observation that the words used, "to A. and his heirs,"

are quite clear and unambiguous; they were and are technical terms, in common use from Norman times to the present, and throughout have, in grants of lands and other hereditaments, created a fee simple, and tersely and compendiously mapped out the lines of descent which they retain.

The rules as to inheritance in fee simple were treated as already settled land by Bracton, writing in the time of Henry III., and it is apparent from all the records of that reign, as well as of earlier reigns, that the distinction between a grant to "A. and his heirs" and a grant to A. and the heirs of his body was well recognized and fully appreciated, as it has ever since been in the history of our law. On what, then, do the Committee found their criticism? The first allusion to the subject is at page 25 of the third Report, where the Committee, referring to the report of the *Oxford Peerage Case*, 1626 (Jones, 123, and Collins' Claims, 190), give an extract from what they describe as "the speech stated to have been delivered by Judge Doderidge in the House when called upon for his opinion on the claims of the Earldom of Oxford, the Baronies of Bolbec, Sandford, and Badlrmere, and the office of Great Chamberlain." The words of Doderidge (as given by the reporter) are these:—"If a man be created earl to him and his heirs, all men do know that although he have a fee simple, yet he cannot alien or give away the inheritance, because it is a personal dignity, annexed to the posterity, and fixed in the blood."

Doderidge's
dictum.

Commenting on these words the Committee say:—"Upon this language it may be observed that such a grant being confined to the grantee and his posterity, is in truth a grant only to him and the heirs of his body, and, therefore, does not resemble a grant of lands in fee simple, which, according to the law of England, as now long settled, would have given the land by descent to any heirs of the grantee, an observation which marks a clear distinction between the grant of a mere dignity and the grant of lands."

This is surely drawing a wide conclusion from narrow premises.

In the first place, Doderidge did not, as the Committee assume, use these words with reference to the Earldom of Oxford or the baronies in question at all. As to the Earldom of Oxford, he merely concurred with the other judges in the judgment delivered by Crewe, C.J., a judgment recognizing that the Earldom of Oxford had originally been granted in fee simple; that it had been forfeited, but that by an Act of Parliament in 16 Rich. II. it was restored, with an altered limitation, viz., to the heirs male. The speech from which the Committee extract the passage quoted above is the speech alleged to have been delivered by Doderidge on the claim to an *office*, not a peerage—the office of Great Lord Chamberlain. This fact is very material.

Occasion of
dictum.

In the next place, in using the language quoted, Doderidge was not in any way dealing with the question whether a peerage granted in fee simple could pass to collaterals of the original grantee; no such point arose or came under consideration in the *Great Lord Chamberlain Case*, nor indeed in the *Oxford Earldom Case*.

In the third place, we must look at the circumstances in which Doderidge used the words. The office of Great Chamberlain had been originally granted in fee simple. Later on, a holder of the office had purported to entail it on the heirs male of his body, and one of the claimants sought to make title to the office under that entail. His argument for the validity of the entail, put in syllogistic form, was this: All inheritances in fee simple are alienable; this office is an inheritance in fee simple; therefore this office is alienable, and if alienable, then, consequently, entailable. It was this argument to which Doderidge's remarks were directed, and his argument was, in effect, this: Your major premiss is unsound; it is not the fact that all inheritances in fee simple are alienable. An earldom in fee simple is not alienable. So that the words were used to show, not that an earldom in fee simple could not descend to collaterals, but merely that it could not be aliened. So far from that, the words themselves imply that Doderidge considered that an earldom *might* be granted in fee simple, and therefore was descendible to heirs collateral in default of heirs lineal.

"Posterity."

The Committee fasten on the word "posterity," and seek from it to draw the inference that, in Doderidge's opinion, an earldom granted in fee simple could only descend to the issue of the grantee. But Doderidge, it is plain, in speaking of "posterity," did not use the word in the sense of issue, but in the broader sense in which it is sometimes used, as appears by the context; for, referring to the words of the charter of Henry II. granting the earldom, "pro me et heredibus meis dicto Alberico et heredibus suis," Doderidge says that: "The King and his posterity are the eminent persons that do repose the trust, and Aubrey de Vere and his posterity are the persons trusted, and therefore they that will alien the same do break the first primary and radical trust."

Now, in this passage the King and "his posterity" obviously include the King's heirs, whether lineal or collateral. Why, then, are we to read, in the very same sentence, the words "Aubrey de Vere and his posterity" in a more restricted sense? Clearly Doderidge must have meant to use them in the same sense in which he uses the words in relation to the King and his posterity. And as he uses the word "posterity" here in the wider sense, so he should be taken to use it in that sense in the passage relied on by the Committee.

There is another objection to treating the passage as importing that

Doderidge considered that an earldom granted in fee simple was descendible only to the issue of the grantee.

The point he makes is, that it is not inconsistent with the absoluteness of an estate in fee simple "that it should be inalienable." If he merely meant to say an earldom, though granted in terms in fee simple, is really nothing but a grant in tail, his argument would have been inconsequent and bad, for it is on the very distinction between the absoluteness of a fee simple, as compared with the qualified character of an estate in tail, that the argument is grounded.

It is necessary to dwell at some length on this misapprehension by the Committee of Doderidge's opinion, because, unfortunately, considerable portions of the Reports are based on this misapprehension.

Thus the Committee, returning to the point, call attention at p. 191 of the third Report to a charter of 14 Rich. II., by which a whole series of grants in favour of the King's uncle, the Duke of Gloucester, were confirmed, and they say: "The language marks a distinction in the terms of grants of lands or annuities and grants of honours. In the same instrument the dignity of Earl of Buckingham was confirmed to the grantee and his heirs for ever, and it seems to have been understood that such a grant of a dignity would not have conveyed the dignity to collateral heirs of the grantee, or even to co-heirs, without a further act of the Crown."

Committee's misapprehension of Doderidge's dictum and their attempts to fortify their conclusions based thereon.

The charter here referred to recites letters patent of the King of the first year of his reign granting to his uncle, then Thomas of Woodstock, the Earldom of Buckingham, to hold "to him and his heirs for ever," and an annuity of 1,000*l*. "to him and his heirs aforesaid," and the charter proceeds to say that for security of our said uncle and of his said heirs, and to preclude certain difficulties, defects, and ambiguities in the premises, the King with the assent of Parliament confirmed to the said Thomas (who had been created in 9 Richard II. Duke of Gloucester) the earldom and annuity beyond and in addition to all and singular the donations, concessions, and grants to the said Duke of Gloucester, for *his life* and *to him and his heirs*, or *to him and the heirs of his body*, or *to him and the heirs male of his body*, or *to him and Alinora his wife*, which had been made, &c.

How this charter supports the Committee's contention that a grant of a peerage in fee simple should be read as a grant in fee tail it is difficult to see. What it rather goes to show is the contrary—that the distinction between the two kinds of limitation was well known and appreciated.

A case more favourable to the Committee's view is cited at p. 189 of the third Report. There the Committee refer to the charter creating the Earldom of Nottingham in 1 Rich. II., 16th July, 1377, to him and his heirs with an annuity to him and his heirs.

It appears that the first earl died, under age, in 1383 (5 Rich. II.), and that in the same year Thomas, his younger brother, then seventeen years of age, was created Earl of Nottingham in tail male with an annuity also in tail male. In regard to this, the Committee say that the first of the patents must have been considered as limited to heirs of his body, otherwise the grant of the patent to Thomas after the death of John would have been unnecessary, but it is quite impossible to draw from this single instance the inference that "heirs" in a peerage grant at that time or antecedently meant heirs of the body. No doubt the grant of a second patent to Thomas and his non-succession to the earldom previously granted to his brother in fee simple are exceptional circumstances, and at this distance of time it is not easy to say why it was that Thomas did not inherit his brother's earldom, but the new grant is very likely susceptible of some simple explanation. Possibly a doubt may have arisen as to the validity of the grant of the first earldom to a child of only thirteen years who never took his seat. It may even be that the succession of collaterals in such a case was not fully established. Whatever the true explanation, the case is quite insufficient by itself to outweigh the fact that for centuries before and after 1383 the distinction between the two, "heirs" and "heirs of the body," in a peerage grant was clearly recognized in innumerable documents and peerage grants amongst them. The very fact that within a few months after the death of John there should have been a second charter to Thomas expressed in such different terms points in itself to the conclusion that the first charter was not regarded as having the restricted meaning suggested.

The above are the only cases which the Redesdale Committee were able to produce in support of their theory that in ancient times the grant of a peerage to a man and his heirs really imported a grant to him and the heirs of his body, and therefore could pass nothing to collaterals.

Difficulty in
adopting
Committee's
conclusions.

Precedent apart, the great difficulty in adopting this theory is one of principle, namely, that the words are technical terms; words of art have, from as far back as the eleventh century, been used as such in legal documents, and according to all recognized rules of construction ought to be read in their technical sense. To read them otherwise—that is, in a more restricted sense—is to derogate from the Crown's grant and put an unjustifiable limitation on its bounty. Nor does the view of the Committee receive any countenance from the sages of the law. Littleton, Coke, Selden, Madox, Blackstone, and other learned and acute authorities know nothing of any such supposed rule.

"Heredibus

Lastly, the meaning of the expression "heredibus suis" in an early

charter (Rich. I), came under consideration in the *Norfolk Case* (1907), A. C. 10. There Sir Robert Finlay, in the course of his argument for the claimant, said: "Roger Bygod died (1307) without heirs." *suis*," meaning considered in *Norfolk Case*, 1907.

Lord Davey: Not without heirs, but without issue.

Counsel for the Claimant: Yes, I was using it in the sense in which it is often used in this case, without issue—without heirs of his body Your Lordships have seen the charter. It is a grant to the Bygod of that time, the great grandfather of Roger Bygod, "quod ipse et heredes sui," should hold the honour of the King.

The Lord Steward (Earl of Halsbury): Not the heirs of his body, but his heirs.

Counsel: No, I take it "heredes" would be read in that connection as meaning the heirs general.

The Lord Steward: Because it is not heirs of the body.

Counsel: Then that feudal earldom to which there was not annexed anything of the dignity of sitting in Parliament as a member of the supreme legislature, descends through four generations to Roger Bygod, the holder, who surrendered in 1302 to Edward I. Roger Bygod had been summoned to Parliament, and had sat in Parliament, and then this new incident of the earldom was one that I submit would not pass to the heirs general of the first grantee. It was not like the case of an earldom being granted nowadays, when the grantee becomes at once a peer of Parliament, and the public importance of that dignity from that point of view altogether dwarfs and swallows up any other incidents of the office. It had been the grant of a feudal earldom to Bygod "ipsi et heredibus suis." Then Roger Bygod is summoned to the first Parliament, and he dies without any issue at all Roger Bygod is summoned to Parliament and Roger Bygod dies without issue.

The Earl of Halsbury: Yes, but dies not without heirs—at least, there is no proof that he died without heirs.

Lord Davey: He may have died without issue if you please, but that does not affect the earldom, the title of honour.

Counsel: No, my lord, the feudal earldom, of course, would descend to the heirs general of the original grantee.

Lord Davey: Yes.

Counsel: But my submission is that a feudal earldom could be surrendered; it was held by him in fee.

The Earl of Halsbury: I am not quite certain I follow what you mean by the "feudal earldom." The earldom is the earldom. I know nothing more about it.

The second suggestion (p. 66, *supra*) which the Committee make, Committee's suggestion (2); see *supra*, p. 66.
viz., that the grant of a peerage to "A. and the heirs of his body,"

meant in the twelfth, thirteenth and fourteenth centuries, a grant to A. and the heirs *male* of his body.

In support of this proposition the Committee refer to the grant of the Earldom of Suffolk, in 9 Rich. II., to Michael de la Pole. The patent of this earldom recited a grant of 11 Edw. III. to Robert de Ufford and his heirs, and stated, quite correctly, that his son William had died "without heirs male." On this the Committee make the following comment (p. 191): "The recital in this patent that William, Earl of Suffolk, had died without heirs male, without mentioning whether he had left heirs of the body of his father or not, may perhaps be deemed to show that the grant of a dignity to a man and his heirs was then considered as a grant to heirs male only, unless the King should think fit to extend its operation to heirs general."

There is, however, insuperable difficulty in adopting the suggestion thus made, for it is not possible, consistently with the cardinal principles of construction, to treat the clear technical meaning of the words "and his heirs" in a gift to a man and his heirs, established by constant usage in thousands of charters, patents, grants, pleadings, judgments, and other deeds and proceedings from the Conquest down, as controlled and modified by a casual recital in a Royal charter of 9 Rich. II.

One might as well argue that because a particular testator in his will describes his illegitimate son as his child, that this may be deemed to show that the term "child" in wills generally included both legitimate and illegitimate children.

The Committee think they find further support for this suggestion in the case of the Earldom of Oxford (created in fee simple terms in the time of Stephen) forfeited and afterwards restored in 16 Rich. II. to Aubrey de Vere and his heirs male. Referring to this case they say (fourth Report, p. 275): "Perhaps, indeed, the limitation to heirs male may have been considered in the reign of Richard II. as the true interpretation of an ancient grant of the dignity of earl to a man and his heirs, and by the word 'heirs' in such a grant heirs male only were intended."

The short answer to this suggestion is that the only effect of so construing the words would be to invalidate the ancient grant; for it is clear that a grant by the King to a man and his heirs male is and always has been void, unless confirmed by Parliament. If, however, it is said that the Committee meant that heirs should be read as heirs male of his body, the answer is that the words "of the body" cannot be implied. (*Wiltes Peerage Case*, L. R. 4 H. L. 126; *Devon Peerage Case*, 2 Dow & Cl. 204.)

To establish the proposition that heirs and heirs of the body meant merely heirs male and heirs male of the body, it ought to be shown by numerous examples that under limitations to heirs and to heirs of the body, the heir general, if a female or several females, was repeatedly passed over, and the peerage devolved, as of course, on the next heir male; but no such evidence is forthcoming. On the contrary, we have case after case (see p. 111) in which an earldom granted in fee simple or in tail general has descended to a single female, or to a person claiming through a female, or has been treated as capable of falling into abeyance.

The absence of evidence in support of the Committee's suggestions.

CHAPTER VI.

LIMITATIONS.

The Crown's
power to
determine.

It is for the Crown, as the creator of a peerage, to determine what the limitations of the dignity shall be, that is to say, on what lines the dignity shall devolve or descend. But this power of the Crown to mould the future of its own creation is not an absolute one. It is controlled by the law, and whilst there are some limitations which the law allows there are others which the law does not allow.

The limitations allowed by the law are settled for the most part by long usage, and are nearly co-extensive with those allowed in the case of the grant of any other hereditament.

Limitations
which are
lawful.

The following limitations in the case of a peerage are good :—

A grant in fee simple—to A. and his heirs ;

A grant in tail general—to A. and the heirs of his body ;

A grant in tail male—to A. and his heirs male of his body ;

A grant in tail special—to A. and the heirs of his body begotten on B. his wife, to B. and the heirs male of her body, or to A. and B. his wife and the heirs male of their bodies ;

A grant to A. for life with remainder to B., whether a relation or a stranger, in tail male or otherwise ;

A grant to A. and the heirs male of his body, with remainder to B. and the heirs or heirs male of his body ;

A grant to A. and the heirs male of his body, with remainder to B., his father, and the heirs male of the body of B., or a grant to A. and the heirs male of the body of his father.

Limitations
which are
unlawful.

On the other hand, the following limitations are bad :—

A grant to A. for life only ;

A grant to A. for years ;

A grant to A. during the pleasure of the Crown ;

A grant to A. and his heirs (or the heirs of his body or the heirs male of his body) during the pleasure of the Crown ;

A grant to A. in tail male, and if he succeeds to another peerage then over to B. in tail male, is invalid as to the gift over ;

A grant subject to any other provision for shifting the estate over before it terminates in the ordinary course ;

A grant to A. and the heirs male of his body, owners for the time being of a specified property.

Until the beginning of the nineteenth century it seems to have been accepted law that peerages could be granted in fee simple, that they could be granted in fee tail general or special, and that they could be granted by way of remainder. Until after 1800 the law clear enough.

On the other hand, it seems to have been equally well accepted law that the Crown could not grant a peerage for an estate of inheritance not known to the common law. The power to grant a peerage for life only was, notwithstanding some precedents, regarded as doubtful.

Fee simple peerages are the earliest known. That was the ordinary limitation of an earldom in the reign of Stephen, and was probably in use from the Conquest. Fee simple in early use.

From the time of Edward II. grants in fee tail general and in tail male became a common form, which gradually superseded fee simple. Fee tail.

From the time of Henry VI. to the present day grants in tail male have almost entirely superseded the earlier forms of limitations.

Grants by way of remainder had also been frequently made from an early time, and no doubt seems to have been cast on the validity of such a limitation. Remainder.

The same cannot be said of peerages for life. Such grants, as will appear later on, had indeed been made on several occasions, but their validity had not passed unchallenged. Doubts as to life peerage.

Coke, in his Institutes (16 a), recognizes these different forms of limitation, and sums up the position thus: "There be some that have inheritance and have it neither by descent nor properly by purchase, but by creation, as when the King doth create any man a duke, a marquis, earl, viscount, or baron, *to him and his heirs, or to the heirs male of his body*, he hath an inheritance therein by creation. . . ." Coke's view.

Crewe, C. J., delivering the opinion of himself and of Waller, C. B., Doderidge, Yelverton and Trevor, JJ., in the *Earldom of Oxford Case*, 1625 (Collins, 177), in reference to the Oxford peerage, which had originally been granted to Aubrey de Vere and his heirs, recognized that there might be an earldom in fee simple. He says:— Crewe, C. J.

"Tenant in fee simple of an honour takes it by Act of Parliament in tail to the males. . . . A noble peer seised in fee of an earldom takes an estate to him and his heirs male by Parliament so long as the male line continues."

And Doderidge, J., in his opinion (1625) to the House of Lords in relation to the office of Lord Great Chamberlain, is to the same effect: "If a man be created an earl to him and his heirs all men do know that, although he have a fee simple, yet he cannot alien," thus recognizing that a fee simple is an allowable limitation for a peerage.

Comyns, C.B. So also Comyns, C. B., in his Digest, under the heading of Dignity (see 4, By patent), says: "And by patent the dignity may be limited to him and his heirs or the heirs of his body or heirs male of his body. So it may be limited only for life."

Table of
Limitations
between A.D.
1135—1450.

In illustration of early limitations in grants of peerage, it may be useful to state in tabular form, as below, the limitation of each peerage created or evidenced by charter or letters patent between the years 1135 and 1450. In some of the earlier entries the word "inferred," in the column of limitation, means that the limitation is inferred from the terms of the charter, or from the limitation of the annuity, to be taken *nomine comitis*, or from the girding ceremony or otherwise. The charters and patents referred to will be found in Vol. 5 of the Redesdale Committee Reports, as indicated in the table by the letters "R. C."

Name.	Date.	Limitation.
Earldom of Essex	Stephen, R. C. V. 1	Fee simple.
Ditto	Maud	Ditto.
Earldom of Hereford ...	Stephen, R. C. V. 1	Ditto.
Earldom of Essex	Stephen, R. C. V. 1	Ditto.
Ditto	Maud	Ditto.
Earldom of Hereford ...	Stephen	Ditto.
Earldom of Norfolk	Hen. II. R. C. V. 2	Ditto, inferred.
Earldom of Arundell or Sussex.	Hen. II. R. C. V. 2	Ditto, inferred.
Earldom of Oxford	Hen. II. R. C. V. 3	Ditto.
Earldom of Norfolk ...	1 Rich. I. R. C. V. 3	Ditto, inferred.
Earldom of Arundell ...		
Earldom of Derby	1 John, R. C. V. 5	Ditto, inferred.
Earldom of Winchester.	1 John, R. C. V. 5	Ditto, inferred.
Earldom of Hereford ...	6 John, R. C. V. 5	Ditto, inferred.
Earldom of Kent	11 Hen. III. R. C. V. 6 ...	Tail special, inferred.
Earldom of Cornwall ...	15 Hen. III. R. C. V. 7 ...	Fee simple.
Earldom of Lincoln ...	Hen. III. R. C. V. 8 ...	Ditto.
Earldom of Lancaster, territorial.	51 Hen. III. R. C. V. 8 ...	Tail general.
Earldom of Chester ...	29 Edw. I. R. C. V. 10 ...	To him and his heirs, kings of England.
Earldom of Richmond .	30 Edw. I. R. C. V. 11 ...	Fee simple.
Earldom of Cornwall ...	1 Edw. II. R. C. V. 12 ...	Ditto.
Earldom of Norfolk, on surrender of Bygod.	6 Edw. II. R. C. V. 17 ...	Ditto.
Earldom of Carlisle	15 Edw. II. R. C. V. 18 ...	Tail male.
Earldom of Gloucester .	11 Edw. III. R. C. V. 27	Fee simple, annuity ditto.
Earldom of Huntingdon	11 Edw. III. R. C. V. 29	Fee simple, annuity ditto.
		By girding. No limitation in charter, but annuity.
Earldom of Northampton.	11 Edw. III. R. C. V. 30	Fee simple.

Name.	Date.	Limitation.
Earldom of Derby	11 Edw. III. R. C. V. 31 ; III. 179.	Fee simple.
Earldom of Suffolk	11 Edw. III. R. C. V. 31	Ditto.
Earldom of Salisbury...	11 Edw. III. R. C. V. 32	Ditto.
Earldom of Cambridge..	14 Edw. III. R. C. V. 40	Tail general.
Earldom of Lincoln ...	23 Edw. III. R. C. V. 45	Fee simple, annuity ditto.
Earldom of Stafford ...	25 Edw. III. R. C. V. 46	Fee simple, life annuities.
Dukedom of Clarence...	36 Edw. III. R. C. V. 53	Tail male.
Dukedom of Lancaster.	36 Edw. III. R. C. V. 53	By girding. Query, in fee simple.
Earldom of Cambridge ..	36 Edw. III. R. C. V. 54	Fee simple, annuity ditto.
Earldom of Bedford ...	40 Edw. III. R. C. V. 54	Tail male of his body by J. his wife, annuity ditto.
Earldom of Northum- berland.	1 Rich. II. R. C. V. 60 ...	Fee simple, annuity ditto.
Earldom of Nottingham	1 Rich. II. R. C. V. 61 ...	Ditto, annuity ditto.
Earldom of Buckingham	1 Rich. II. R. C. V. 62 ...	Ditto, annuity ditto.
Earldom of Nottingham	5 Rich. II. R. C. V. 63 ...	Tail male, annuity ditto.
Earldom of Cambridge .	5 Rich. II. R. C. V. 63 ...	Fee simple, annuity ditto.
Dukedom of York	9 Rich. II. R. C. V. 64, 67	Tail male, annuity ditto.
Dukedom of Gloucester	9 Rich. II. R. C. V. 65, 67	Tail male, annuity ditto.
Dukedom of York	9 Rich. II. R. C. V. 64, 67	Ditto.
Earldom of Suffolk	9 Rich. II. R. C. V. 69, 70	Ditto.
Marquisate of Dublin...	9 Rich. II. R. C. V. 76 ...	For life, and special benefits ditto.
Dukedom of Ireland ...	10 Rich. II. R. C. V. 79...	For life, annuity ditto.
Barony of Beauchamp of Holt.	11 Rich. II. R. C. V. 81...	Tail male.
Earldom of Huntingdon	11 Rich. II. R. C. V. 82...	Tail special, annuity ditto.
Earldom of Buckingham	14 Rich. II. R. C. V. 89...	Fee simple, annuity ditto.
Earldom of Oxford	16 Rich. II. R. C. V. 109	Act of restoration to him and his heirs male for ever.
Earldom of Somerset ...	20 Rich. II. R. C. V. 115 ; III. 192.	Tail male, annuity ditto.
Earldom of Wiltes	21 Rich. II. R. C. V. 117	Ditto, for ever.
Marquisate of Somerset	21 Rich. II. R. C. V. 117	Ditto, annuity ditto.
Dukedom of Hereford .	21 Rich. II. R. C. V. 118	Ditto.
Dukedom of Surrey ...	21 Rich. II. R. C. V. 118	Ditto.
Dukedom of Exeter ...	21 Rich. II. R. C. V. 118	Ditto.
Dukedom of Albemarle	21 Rich. II. R. C. V. 118	Ditto.

LIMITATIONS.

Name.	Date.	Limitation.
Dukedom of Norfolk ...	21 Rich. II. R. C. V. 118	Tail male.
Earldom of Gloucester .	21 Rich. II. R. C. V. 119	Ditto.
Prince of Wales	1 Hen. IV. R. C. V. 129	To him and his heirs, kings of England.
Earl of Dorset	13 & 14 Hen. IV. R. C. V. 168; III. 196.	Tail male, annuity ditto.
Dukedom of Clarence...	13 & 14 Hen. IV. R. C. V. 168; III. 196.	Ditto, annuity ditto.
Dukedom of Bedford ...	2 Hen. V. R. C. V. 171; III. 197.	For life, annuity ditto.
Dukedom of Lancaster.	2 Hen. V. R. C. V. 171...	Ditto, annuity ditto.
Dukedom of Gloucester	2 Hen. V. R. C. V. 171...	Ditto, annuity ditto.
Dukedom of Bedford ...	2 Hen. V.	Ditto, annuity ditto.
Earldom of Northum- berland.	3 Hen. V. R. C. V. 178; III. 197.	Fee simple, annuity ditto.
Earldom of Exeter	4 Hen. V. R. C. V. 184...	For life, annuity ditto.
Earldom of Salisbury...	9 Hen. V. R. C. V. 189...	Tail male.
Earldom of Pembroke .	11 Hen. VI. R. C. V. 224	Ditto.
Earldom of Benanges...	11 Hen. VI.	Fee simple.
Barony of Beaumont ...	18 Hen. VI. R. C. V. 235	Tail male.
Earldom of Shrewsbury or Salop.	20 Hen. VI. R. C. V. 237	Ditto.
Earldom of Dorset	20 Hen. VI. R. C. V. 238	Tail male, annuity ditto.
Barony of Sudeley	20 Hen. VI. R. C. V. 239	Ditto, annuity ditto.
Earldom of Pembroke .	21 Hen. VI. R. C. V. 240	To A. and B. and the heirs male of their bodies contingently on death without issue of king's uncle.
Marquisate of Dorset...	21 Hen. VI. R. C. V. 238	Tail male, annuity ditto.
Earldom of Kendal	21 Hen. VI. R. C. V. 241	Tail male.
Dukedom of Exeter ...	22 Hen. VI. R. C. V. 241	Ditto, annuity ditto.
Earldom of Warwick ...	22 Hen. VI. R. C. V. 242	Ditto.
Dukedom of Bucking- ham.	23 Hen. VI. R. C. V. 243	Ditto, annuity ditto.
Dukedom of Warwick...	22 Hen. VI. R. C. V. 244; III. 210.	Ditto.
Barony of De Lisle.....	22 Hen. VI.	To him and his heirs, lords of the manor of K. L.
Earldom of Norfolk.....	23 Hen. VI. R. C. V. 248	Tail male, annuity ditto.
Barony of Beaumont...	23 Hen. VI.	Ditto.
Marquisate of Suffolk...	23 Hen. VI. R. C. V. 251	Ditto, annuity ditto.
Earldom of Waterford...	24 Hen. VI.	Ditto.

Name.	Date.	Limitation.
Barony of Beauchamp .	25 Hen. VI. R. C. V. 256	Tail male. annuity ditto.
Dukedom of Bucking- ham.	23 Hen. VI. R. C. V. 257; III. 211.	Ditto.
Dukedom of Somerset...	24 Hen. VI. R. C. V. 258	Ditto, annuity ditto.
Baron Rivers	26 Hen. VI.	Ditto, annuity ditto.
Barony of Stourton.....	26 Hen. VI.	Ditto.
Barony of Hoo and Hastings.	26 Hen. VI.	Ditto.
Earldom of Wiltes	27 Hen. VI.	Ditto.
Earldom of Worcester ..	27 Hen. VI.	Ditto.
Earldom of Warwick ...	27 Hen. VI. R. C. V. 274; III. 158.	To R. and A. his wife and the heirs of her body.
Barony of Egremont ...	28 Hen. VI.	Tail male, annuity ditto.
Earldom of Warwick ...	28 Hen. VI.	To R. and wife and the heirs of her body, and in default remainders over.
Barony of Grey de Richemont	28 Hen. VI.	Tail male, annuity ditto.
Barony of Egremont ...	29 Hen. VI.	Ditto.
Viscounty de Lisle	29 Hen. VI.	Ditto, annuity ditto.
Earldom of Warren and Surrey.	29 Hen. VI.	Ditto, annuity ditto.

With such an array of precedents before them, it is not surprising that lawyers like Coke, Crewe, Doderidge, Selden and Comyns came to the conclusion that peerages, like land, might be limited in fee simple, tail general, and tail male; nor can we, in the twentieth century, come to any other conclusion.

It is somewhat startling, therefore, to find the Redesdale Committee in their fourth Report (at p. 265) committing themselves to the statement that "according to the law of England, at least as now understood, a *dignity simply cannot be granted in fee simple*; it can only be granted to the person described in the grant and to the heirs general or special of his body." By what process of reasoning the Committee arrived at this conclusion it is difficult to say. Historically, as we have seen, peerages were for centuries granted in fee simple, and no statute has ever prohibited such grants, nor are they repugnant to the principles laid down in the *Wiltes Peerage Case* (L. R. 4 H. L. 126) and the *Buckhurst Peerage Case* (2 App. Cas. p. 1), for fee simple is an estate well known to the common law.

Paradoxical
proposition of
Committee.

Remainders.

Remainders. A peerage may be limited by way of remainder, whether after a life estate or an estate tail.

The earliest case of peerage in remainder is that mentioned in Doderidge's "Law of Nobility," in which reference is made to a patent whereby Hubert de Burgh was made Earl of Kent in the time of Henry III. by these words: "Habendum sibi et heredibus suis de corpore Margaretæ uxoris suæ sororis Alexandri Regis Scotiæ procreatis et pro defectu talis exitus remanere rectis heredibus dicti Huberti." This grant is cited by Lord Brougham in the *Devon Peerage Case* (Nicholas' Report, p. 68), but the patent or charter does not appear to be extant, and the authority of the work known as Doderidge's "Law of Nobility" does not stand very high. (See *supra*, p. 24.)

Examples. The following are a few examples of remainders limited under peerage grants:—

Warwick, 1450.
28 Hen. VI.
March, 1450. The Earldom of Warwick was granted to Richard Neville and Anne his wife, and to the heirs of her body, with remainder to Margaret Countess of Shrewsbury (her sister), and to the heirs male of her body, with remainder to the heirs of the body of Margaret, with remainder to the right heirs of Richard, then late Earl of Warwick.

Somerset, 1536. In 1536 Edward Seymour, the Protector, was created Earl of Hereford and Viscount Beauchamp, with remainder to the heirs male of his body thereafter to be begotten, thus excluding his then living son and heir apparent and the issue of such son. The Earl was subsequently—in 1547—created Baron Seymour and Duke of Somerset, with remainder to the heirs male of his body by Anne, his second wife, and, failing them, to the heirs male of his body by his first wife. His issue male by his second wife failed in 1750, when the Barony of Beauchamp and the Earldom of Hereford became extinct, but the Dukedom of Somerset and Barony of Seymour devolved on Sir Edward Seymour as the original grantee's heir male by his first wife.

Percy, 1556.
4 Philip &
Mary,
30th April,
1556. The Barony of Percy was granted to Thomas—son of Sir Thomas Percy, attainted in 19 Hen. VIII.—in tail male, with remainder to his brother Henry in tail male, and on the same day the Earldom of Northumberland was also granted to him with similar limitations.

Colchester, 1621. In 1621 Thomas Lord d'Arcy of Chiche, by a patent reciting that he was then old and had no issue male, was created Viscount Colchester for life, with remainder to Sir Thomas Savage and the heirs male of his body by Elizabeth his wife, eldest daughter of the said Lord d'Arcy.

Chichester, 1644. In 1644 Francis Leigh was created Earl of Chichester, with

remainder, failing his issue male, to Thomas Earl of Southampton and his issue male by Elizabeth his wife, the daughter of the said Earl of Chichester.

1652. Thomas Howard restored to Dukedom of Norfolk by Act Norfolk, 1652.
29th December, 1660, confirmed by another Act 20th December, 1661, with limitation to him in tail male, remainder to his father in tail male, remainder to his grandfather in tail male, with remainder over.

1711. The dignity of Viscount Bolingbroke was granted by patent Bolingbroke, 1711.
to Henry St. John in tail male, with remainder to his father in tail male.

In 1670 Barbara Villiers was created Baroness Nonsuch, Countess of Cleveland, 1670.
Southampton, and Duchess of Cleveland for life, with remainder to Charles and George Fitzroy, her natural sons by Charles the Second, and the heirs male of their bodies respectively.

In 1676 Sir George Sondes was created Baron Throwley, Viscount Feversham, 1676.
Sondes, and Earl of Feversham during his life, with remainder, after his decease, to Lewis, Baron Duras (who had married Mary, his eldest daughter), and the heirs male of his body.

In 1689 Frederick de Schomberg was made Baron Teyes, Earl of Schomberg, 1689.
Brentford, Marquis of Harwich, and Duke of Schomberg, with remainder to his second son and his issue male, failing which, to his eldest son and his issue male.

In 1708, James Douglas, Duke of Queensberry in Scotland, was Beverly, 1708.
created Baron of Rippon and Marquis of Beverly, both in the County of York, and Duke of Dover during his natural life, with remainder to Charles, Earl of Galloway in Scotland, his second son, and the heirs male of his body, in default of which to George, his third son, and the heirs male of his body, with remainders over to other sons successively.

In 1716, Thomas, Lord Coningsby in Ireland, was created Baron Coningsby, 1716.
Coningsby, of Coningsby in Lincolnshire, to hold to him and the heirs male of his body by any wife he might afterwards marry; and in 1719 he was created Earl of Coningsby, to hold to him and his heirs male by any wife he might afterwards marry, in default of which the dignity of Countess Coningsby was to go to his daughter Margaret, Viscountess Coningsby, who was his eldest daughter by his second wife, and was created a Viscountess in 1716, and the dignity of Earl Coningsby to the heirs male of her body; thus by these remainders his son by his first wife was passed over, and though the son and heir of his son became Lord Coningsby in Ireland, he never succeeded to the English honours, of which the earldom devolved on his half-sister Margaret.

In 1749, Algernon, Duke of Somerset, was created Baron Wark- Warkworth, 1749.
worth and Earl of Northumberland, with remainder to the heirs male

of his body, in default of which to his son-in-law, Sir Hugh Smithson, and his heirs male begotten on the body of Elizabeth his wife (daughter and heiress of the said duke); in default of such issue, the dignities of Baroness Warkworth and Countess of Northumberland were to go to the said Lady Elizabeth Smithson, and of Baron Warkworth and Earl of Northumberland to the heirs male of her body. Thus on the death of the Duke of Somerset without issue male, the barony and earldom devolved on Sir Hugh Smithson.

Lowther, 1797. In 1797, James, first Earl of Lonsdale, was created Baron and Viscount Lowther of Whitehaven during his natural life, and from and immediately after his decease to the heirs male of the body of Sir William Lowther of Swillington, deceased (a collateral relation).

Sandys, 1802. In 1802, Mary, Marchioness of Downshire, was created Baroness Sandys, and the barony was limited to her second, third, and every other son successively in tail male, failing which it was to go to Arthur, her eldest son in tail male.

Vane, 1823. In 1823, Charles, Marquis of Londonderry in Ireland, and Baron Stewart of Stewart Cross in the peerage of Great Britain, was created Viscount Seaham and Earl Vane, with remainder to the heirs male of his body by Frances his then wife, thus excluding his son by his first wife, and his issue by any future wife.

Mansfield, 1792. 1792. The Earldom of Mansfield was granted to Lord Mansfield in tail male, with remainder to his nephew, Viscount Stormont, in tail male.

Cromartie, 1861. 1861. The Earldom of Cromartie was granted to Anne, Duchess of Sutherland, with remainder to her second son in tail male, with remainder to such son in tail general.

Buckhurst, 1864. 1864. The Barony of Buckhurst was granted to Elizabeth, Countess De la Warr, for life, with remainder to her second son in tail male, with remainder to her third son in tail male, with remainder to a daughter in tail male, with remainder to another daughter in tail male.

Wolseley, 1885. 1885. Lord Wolseley was created Viscount Wolseley in tail male, with remainder to his daughter in tail male.

How a Remainder in a Peerage takes Effect.

How a remainder takes effect.

A question has been raised as to the precise mode in which a limitation by way of remainder under a peerage grant takes effect. *Prima facie* where a peerage has been granted to A. and the heirs male of his body, and in default of such issue to B. and the heirs male of his body, the Crown's intention would seem to be to create one peerage and one only, and to declare that it shall go first to A. in tail male and then, by way of remainder, to B. in tail male. That is the

natural and obvious meaning of the words used; and the intention so manifested should, according to all principles of construction, govern the operation of the grant.

This, however, is said to be incorrect, and the singular theory has been advanced that each remainder, in such a case, is to be regarded as creating a separate and distinct peerage. So that if a peerage were granted to A. in tail male, with remainder to B. in tail male, with remainder to C. in tail male, with remainder to D. in tail male, the patent would create not one, but four separate and distinct peerages, each carrying the same name and each taking effect successively as the peerage ranking in priority to it determined. This strange theory was first suggested by the Earl of Shaftesbury (1678), in the *Purbeck Case* (see Collins, Claims, p. 303); Sir William Jones, the Attorney-General, arguing in support of the validity of a surrender of a peerage to the Crown by fine, urged that a peerage must be within the Statute of Fines, for, if not within that statute, it could not be within the Statute De Donis; and if so, if it were not within the Statute De Donis, all remainders would be invalid, for there could be no remainder after an estate of inheritance except by virtue of the Statute De Donis, and therefore to hold peerages not within the Statute of Fines would, in effect, invalidate the title of many peers, for many sat by virtue of grants in remainder. Lord Nottingham, the Lord Chancellor, in his speech agreed with the Attorney-General's contention, but Lord Shaftesbury said that it was not the case that any of their Lordships sat under a title by way of remainder, but that they sat "by virtue of a new or subsequent grant in the same patent." (Collins, p. 305.)

Theory of
separate
grant.

The Redesdale Committee have treated this dictum as axiomatic. Thus, we find the Committee (at p. 58, third Report) saying, with reference to the Bolingbroke grant in 1711 (*supra*, p. 81): "In that case the dignity of Viscount Bolingbroke was granted in 1711 by a patent to Henry St. John and heirs male of his body, and in default of such issue remainder to Sir Henry St. John and the heirs male of his body. This grant could not operate as a remainder, as it would have done in the case of a similar grant of land by which the grantor was before seised in fee simple; that is, as so much more of the existing estate in the land not before granted derived out of the fee simple remaining after the first grant to the grantor. The grant of the dignity of Viscount Bolingbroke to Sir Henry St. John and the heirs male of his body could only [*sic*] operate as an original grant by way of creation, to take effect on a contingency. . . . Its existence, therefore, depended on the terms of the grant, and it could have no existence except according to the terms of the grant; that is, after the death or failure of issue male of Henry Viscount Bolingbroke. Its

Redesdale
Committee
support this
notion.

existence, therefore, necessarily remained contingent till the death or failure of issue male of Henry Viscount Bolingbroke. When that event happened the contingency was determined. The second grant then, and then only, took effect."

The Committee return to the subject again at p. 266 of the fourth Report, where they say that "if a grant of a dignity is made to A. and the heirs male of his body, and in the same patent, failing such issue, a grant is made to B. and the heirs male of his body of a dignity of the same degree and with the same name . . . the two grants are separate and distinct, and nothing affecting the dignity first granted will affect the dignity granted on the failure of the issue and the person to whom the first dignity was granted; but on the happening of that event, being the event on which the second grant was, by the terms of the grant, to take effect, the second grant will operate, notwithstanding the forfeiture of the dignity first granted and its consequent extinction."

Lord
Shaftesbury's
dictum
induced by
misapprehen-
sion.

Lord Shaftesbury, in enunciating the dictum thus emphasized by the Redesdale Committee, no doubt sought to meet the argument of the Attorney-General, which assumed that peerages limited by way of remainder after an estate tail were invalid, unless a peerage granted in tail was a tenement within the Statute De Donis. Had his Lordship been aware that the assumption was unsound he might and probably would have taken a different view.

Remainders
before the
Statute De
Donis legal.

We know now that the assumption was unsound, for the late Professor Maitland has shown that remainders after estates tail were recognized as legal, and were in common use before the Statute De Donis (passed 13 Edw. I.). (See Law Quarterly Review, Vol. 6, p. 22; and Pollock & Maitland, II. p. 19, n. 6.)

And this is in accordance with what Bracton, writing in the time of Henry III., explicitly states in Book I., c. 1, and with the fact that the term *feudum talliatum* fee tail was mentioned in several of the statutes passed in the same year as the Statute De Donis; in particular in c. 4, as to dowers, in c. 5, as to advowsons, and in c. 9 as to distress. Moreover, on a roll slightly older than that, the Statute de Banco Roll, Mich. 11 & 12, we find the term in use, "Emma non habuit . . . nisi feudum talliatum secundum formam donationis predictæ." (See Pollock & Maitland, *supra*.)

Further, though doubts have been entertained whether there was any remedy for the remainderman at common law, those doubts are set at rest by cases referred to in the *Abbreviatio Placitorum*, which, on examination, show that where the remainder was, as it usually was, created by fine levied in the King's Court, the remedy of the remainderman was by *scire facias* to have execution of the fine in accordance with its tenor.

An interesting case of the kind appears in the Coram Rege Rolls, Easter term, 9 Edw. II., Roll 117. In it a fine levied in Easter term, 6 Edw. I. (therefore before the Statute De Donis), between William de Percy and Richard Cotele is recited, and shows that Richard thereby acknowledged the land in question to be the property of William de Percy, and that in consideration thereof William de Percy granted the land to Richard and Isabel his wife, with remainder to John, son of Richard, in tail general, with remainder to Thomas, another son, in tail general, with remainder to Isolde, sister of Thomas, in tail general, with remainder to the right heirs of Richard. The record shows that Richard and Isabel being dead, and John and Thomas being dead without issue, George, the son of Isolde, obtained a writ of *scire facias* against the parties in possession to show why he should not have execution and delivery of the land in accordance with the tenor of the fine. It was alleged amongst other things by way of defence that he was illegitimate, and this was referred to the bishop, who certified that he was legitimate, and eventually the case was determined in favour of George, and he was granted execution according to the tenor of the fine. There are other cases.

But there is another reason for pronouncing the Attorney-General's argument to be unsound, for it by no means follows, as he contended, that if a peerage limited in tail is within the Statute De Donis that, therefore, it is within the Statute of Fines.

Thus there was and is no necessity for adopting the theory put forward by Lord Shaftesbury in his dictum in the *Purbeck Case*, and it seems much more rational to treat a peerage grant with remainders over as creating one peerage and one only. The House of Lords is not disposed by any forced construction to treat a patent as creating several peerages, where it is obviously intended to operate as a creation only of one. (See the *Buckhurst Peerage Case*, 2 App. Cas. 1.)

Limitations not allowed by Law.

(1) *Life Peerages.*

There is no doubt that peerages for life have been expressed to be granted in our early history. The following are some instances:—

1. The creation of Guichard D'Angle as Earl of Huntingdon for life. (1 Rich. II., 1377.) He was a foreigner and could not sit in Parliament.

2. The creation of Robert De Vere, Earl of Oxford, to be Marquis of Dublin for life. This creation was in the same reign, 9 Rich. II., 1385, but the grant, it may be remarked, was made in Parliament with the assent of the nobles and Commons.

3. The creation in 13 Rich. II., 1390, of the Duke of Lancaster as Duke of Aquitaine for life.

4. The creation in 21 Rich. II., 1398, in Parliament of Margaret Countess of Norfolk as Duchess of Norfolk for life.

5. The creation in 2 Hen. V., 1414, in Parliament of John of Lancaster as Earl of Kendal and Duke of Bedford for life, with a grant of 20*l.* for the earldom and 40*l.* for the dukedom. The grant was subsequently surrendered, and a re-grant in tail male made.

6. The creation in 2 Hen. V., 1414, of Humfrey Duke of Lancaster to be Earl of Pembroke and Duke of Gloucester for life.

7. The creation in 2 Hen. V., 1414, of Richard Duke of York to be Earl of Cambridge for life.

8. The creation in 4 Hen. V., 1416, of Thomas Earl of Dorset to be Duke of Exeter for life.

9. The creation in 10 Hen. VI., 1433, and 11 Hen. VI. of Sir John Cornewall to be Baron Fanhope and then Baron Milbroke with seat in Parliament but without limitation.

10. The creation in 1607 of James Hay to be a baron for life, followed in 13 James I. by a grant in his favour of the barony of Hay of Sawley in tail male.

In view of these precedents, it is not to be wondered at that generations of lawyers should have recognized the power of the Crown to grant life peerages.

Coke laid down the proposition (Inst. I. 16 b) that "the King may create either man or woman noble for life, but not for years, because then it might go to the executors or administrators."

Selden referred to the creation of peerages for life without comment.

Chief Baron Comyns in his Digest treats peerages for life as unquestionably valid. (See *supra*, p. 76.) So does Doderidge.

Blackstone, writing in 1765, said "that a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all. . . ."

Cruise takes the same view.

The Redesdale Committee in their Reports refer to most of the grants of life peerages, and appear to entertain no doubt as to their validity; on the contrary, they appear to assume their validity to be impregnable. (See third Report, pp. 38, 189, 191, and 197.)

Nevertheless, doubts as to the validity of such peerages have been expressed in other quarters.

Thus in the *Purbeck Case*, 1660 (Collins, Claims, p. 273) Lord Shaftesbury expressed doubts as to whether a peerage could validly be created for life only. "Mr. Attorney," said his Lordship, "gives no reason and takes for granted as clear law that the King can make lords for life, and they shall sit in the Lords' House, and yet their

Grave doubts
to the
contrary.

baronies shall not go to their heirs nor their children be ennobled by it. This is a point of greater consequence, if possible, than the thing in dispute."

This doubt was more fully elaborated by Mr. Hargrave—a lawyer of great learning—in his Commentary on "Coke upon Littleton" (19th ed. 1832, note A. at 16 b). There he remarks: "Notwithstanding Lord Coke's proposition here of the King's power to make a man or woman noble for life, and his stating in his ninth Report, pp. 97, 98, the King's power of making an earl for life. . . . I doubt whether the legality of such creation can be supported; I am rather impressed that the quality of being hereditary is of the essence of our peerage, and that attributing to the King a prerogative of creating peers for life only is to invest the Crown with a power of gradually destroying the peerage in its subsisting state, which I believe is *de facto* such as not to furnish an instance of a peer sitting as a lord of Parliament under a life interest."

But it was not until the year 1856 that the question of the validity of life peerages arose in what may be called an acute form.

In January, 1856, Queen Victoria by letters patent under the Great Seal—Lord Brougham being then Chancellor—created or purported to create the Right Honourable Sir James Parke, Knight, a baron for life by the title of Baron Wensleydale, and a writ of summons to Parliament was issued to him, but at the time he was ill, and in his absence a copy of the letters patent was laid on the table of the House. The validity of this grant was at once challenged, and Lord Lyndhurst moved that the copy of the patent be referred to the Committee for Privileges for consideration and examination, and to report thereon to the House, saying that the creation of a peerage for life was contrary to the settled usage of the last 400 years, to the principles of the Constitution, and of the privileges of Parliament. And his Lordship referred to various cases in which peerages for life had, as it was alleged, been granted, and to Lord Coke's dictum in favour of the Crown's power to grant such peerages, and expressed the opinion that the power of the Crown, even assuming it ever had such power in this respect, has been lost by desuetude. On the other hand, Lord Granville maintained that the power of the Crown to create peers for life had existed; had been frequently exercised and was not lost. And he referred to various authorities. Lord St. Leonards considered that the creation was illegal. The Lord Chancellor denied the power of the House, without a reference from the Crown, to question the validity of the grant of the peerage by the Crown, and he referred with approval to Lord Coke and to Mr. Justice Doderidge's "Treatise on the Nobility" in support of their legality (*supra*, p. 86), and to the report on the dignity of a peer (Redesdale

The Wensleydale Peerage,
1856,
5 H.L.C. 958.

Committee, third Report, p. 38), prepared under the careful superintendence of Lord Redesdale, which referred to the assertion that persons to whom dignities had been granted by the Crown had usually had therein rights of inheritance, and said that this assertion must be understood as not extending to every dignity, particularly the dignity of a knighthood which had never been enjoyed hereditarily, or even to the dignity of a peerage where the terms of the instrument by which it had been created expressed the contrary. Further, that in the same report (p. 191) Lord Redesdale referred to the creation of Edward, son of the Duke of York, as Earl of Rutland for the life, not of himself, but of his father, and described the grant and its legal effects, but did not suggest one word as to its invalidity. (Report Dignity of a Peer, Vol. II. p. 191.)

Lord Campbell contended that the House had a right of its own authority to inquire into a new patent, and though he did not positively say that the creation was illegal, he said that the more he investigated and deliberated the more reason he saw to entertain doubt upon the subject of its legality.

In the result the motion for a reference to the Committee was carried.

The Committee for Privileges sat, and evidence was produced that for the last 400 years there was not a single instance of a commoner with a peerage for life taking his seat in the House. (See *supra*, p. 85.)

Life peerages
held illegal.

In the result the Committee reported that, as directed by the House, they had examined and considered the copy of the letters patent purporting to create the Right Honourable Sir James Parke, Knight, a baron of the United Kingdom for life, and they report it as their opinion that neither the said letters patent, nor the said letters with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit and vote in Parliament. The report was presented to the House, and after debate agreed to, and it was by the House resolved and adjudged accordingly. This determination has ever since been recognized as sound law, and it would seem to establish the position that peerages for life never have been validly granted in England, except with the concurrence of Parliament.

Lords of
Appeal in
Ordinary.

However, by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), as amended by the Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), the Crown was empowered by letters patent to appoint a limited number of Lords of Appeal in Ordinary for the purpose of aiding the House of Lords in the hearing and determination of appeals, and it was provided that every Lord of Appeal in Ordinary, unless otherwise entitled to sit as a member of the House of Lords, shall, by virtue and according to the date of his appointment, be entitled

during his life to rank as a baron by such style as the Crown may be pleased to appoint, and shall be entitled to a writ of summons to attend and sit and vote in the House of Lords. His dignity as a lord of Parliament shall not descend to his heirs.

(2) *Peerages for an Estate of Inheritance not known to the Common Law.* Peerage for estate of inheritance not known to common law. "Heirs male for ever."

The leading case on this point is the *Wiltes Peerage*, 1869 (L. R. 4 H. L. 126). The peerage, in this case (the Earldom of Wiltes), was granted in the reign of Richard II. The limitation was to the grantee and his "heirs male for ever." The grantee was beheaded by Henry of Lancaster when he invaded England, shortly before his accession to the throne as Henry IV. The grantee died without issue, but in 1862 his collateral heir male claimed the dignity by virtue of this remarkable limitation. It was held, however, that the limitation was illegal.

"The Crown," said Lord Chelmsford, "may undoubtedly create peerages with every sort of limitation which the law recognizes. It has even been said that a man may be ennobled during the life of another or for years, but such grants as these could hardly be maintained, and, at all events, are not likely ever to be made. In the appendix to Sir Harris Nicholas' Report of the *Devon Case* various instances are given of peerages granted with peculiar limitations, but all of them limitations familiar to the law. In the cases where the dignity is given to the heirs of the body of the wife of the grantee, or to the issue male of the second wife, or to the heirs male of a second husband, or to a second son and the heirs male of his body, each of these limitations is a good *descriptio personæ*, and in a grant of lands would carry them to the person designated as a purchaser. But these instances are all of them inapplicable to the case of a limitation which it is admitted could not prevail in other grants than those of dignities . . . The question then presents itself in the simplest and clearest manner, whether it is competent to the Crown to give to a dignity a descendible quality unknown to the law, and thereby to introduce a new species of inheritance and succession? The question, put in this way, seems to answer itself. The Crown can have no such power unless there is something so peculiar in a dignity, so entirely within the province of the Crown to mould at its pleasure, that a limitation void as to every other subject of grant is good and valid in the creation of a peerage. No one has pushed the argument to this extravagant length, and yet, if any one limitation which the law prohibits in the grant of property may be applied by the Crown to the grant of a dignity, it is difficult to see how you can stop short of holding that there is no restriction upon the Crown's establishing any order of succession to a dignity, however novel and extraordinary."

This decision in effect overruled the decision in the *Devon Peerage Case* (2 Dow & C. 204).

Shifting
provision
invalidity.

*The Buckhurst
Peerage Case,*
2 App. Cas. 1.

(3) *Shifting Provision annexed to Peerage Grants in tail or otherwise.*

In 1864 the Barony of Buckhurst was granted to the Countess De la Warr for life, and after her decease the same dignity was granted unto her second surviving son and the heirs male of his body, and, in default of such issue, to the third surviving son of the Countess and the heirs male of his body, with remainders over. And there was a proviso that if the said second son, or any other person taking under the patent, should succeed to the Earldom of De la Warr, then the Buckhurst title should go over and devolve upon the son of the original grantee, who would be next entitled to succeed to the Buckhurst dignity if the person so succeeding were dead without issue.

On the accession of Lord Buckhurst to the Earldom of De la Warr the validity of these limitations came in question, and the House of Lords held that a shifting clause of this kind, transferring the dignity on the happening of a collateral event, was unknown to the common law of England, and therefore void. Lord Cairns states the reasons for the decision with admirable lucidity. "It is," said his Lordship, "a very strong observation that, with the exception of one other patent coeval almost with the one of which I am speaking, no instance has been found in which a clause of this kind, appearing to shift over a dignity from one person to another, has ever been introduced. Moreover, the observation is obvious, that if this is a valid clause which can be attached to a grant of peerage, a peerage becomes a title which can be made to shift upon the occurrence of a collateral event wholly unconnected with the failure of issue; it can be made to be taken away from the holder of it for the time being, and passed over to some other person who was not the holder of it before. It is very true that the occurrence upon which, in the present instance, this shifting is made to depend is the succession of the holder of the barony to a higher title, so that the event leaves the person who has been the holder of the barony in possession of the dignity of the peerage and of a rank still higher than before. He will, therefore, still continue to possess a seat in your Lordships' House. But it is simply an accident that the collateral event here specified can be thus described and has that particular consequence. If the proviso is valid with regard to an event of that kind, it must be equally valid with regard to any other collateral event, however different such collateral event may be. My Lords, of course, in all matters, especially matters touching the limitation of peerages and of dignities, the introduction of a clause at the present day altogether unusual and altogether

unknown in the previous history of the country is of itself a matter of great gravity and of extreme importance, and requires to be most carefully and narrowly examined by your Lordships. My Lords, I will also remind your Lordships, without referring at any length to authorities upon the subject, that, with regard to peerages, it is the well-established and constitutional law of the country that a peerage, partaking of the qualities of real estate, must be made in its limitation by the Crown, so far as it is descendible, descendible in a course known to the law, and that in the descent of peerages there cannot be introduced variations or alterations in the ordinary law of the country with regard to descent; and, by a parity of reasoning, there cannot be introduced provisions and conditions controlling and moulding the descent of a peerage in a manner different from that in which real estate can be made to descend according to the law of the country. I will refer your Lordships to one very recent decision, in which the whole of this question was considered. I mean the *Willes Peerage Case* (L. R. 4 H. L. 126), in which it was clearly laid down by the Committee for Privileges of your Lordships' House, and the Report of the Committee was confirmed by the House, that the Crown cannot give to a grant of a dignity or honour a quality of descent unknown to the law. Upon that point there was no difference of opinion among the noble Lords who expressed their opinion upon the subject." His Lordship then critically examined the terms of the patent, and came to the conclusion that the true meaning of the proviso was to shift from time to time the peerage; and, after pointing out that real estate could not at common law be limited in this way, but only under the Statute of Uses, and that the Statute of Uses had no application to peerages, his Lordship proceeded: "My Lords, the result, therefore, is this: You have here letters patent dealing with the peerage upon the principle of a shifting of estates by way of use. That is a mode in which, I have no hesitation in saying, you cannot deal with a peerage; and putting aside, as indeed it was admitted at the Bar that you must put aside, the principle of the shifting through the operation of the Statute of Uses, the simple question your Lordships have to consider is: Supposing this to be a grant at common law, could you have engrafted upon estates limited in succession in tail a proviso determining those estates upon a collateral event and professing to give them over before the natural termination of the estates? My Lords, the answer to that question must be that it could not be done; and therefore I arrive at the conclusion that, dealing with this proviso upon those principles upon which we must deal with it, it is one which could not have effect given to it."

Lord Chelmsford, Lord Hatherley and Lord O'Hagan concurred. "You are asked," said the last named, "to pronounce in favour of a

title which could not be supported at common law and cannot be helped by statute. You are asked, contrary, as I conceive, alike to principle and policy, to take from a peer a barony which has been vested in him, and in right of which he has sat and voted, and, while he is still alive, to transfer it to another. And you will scarcely be encouraged to sanction such an innovation by the reflection that no one can anticipate without apprehension the possible, however improbable, consequences, under circumstances conceivable though most unlikely to occur, of permitting conditional and shifting peerages to be made the instruments of injurious interference with the honour and independence of your Lordships' House."

Views of the Redesdale Committee as to Limitations commented on.

Redesdale
Committee's
views.

Having shown how the law stands in regard to the limitations which are allowable and not allowable respectively, it will be convenient here to refer briefly to the remarkable conclusions on the subject of the Redesdale Committee, more especially as they account for not a few of the strange attempts, claims, and patents of the nineteenth century.

Not the least disturbing of these conclusions was that which declared it to be a mistake to suppose that the grant of peerage was to be treated as regulated by the rules relating to land.

Thus in the third Report (at p. 60) the Committee say that "upon questions respecting the title to dignities merely personal, there is danger of error whenever the rules of law respecting such dignities are considered as having any close analogy to the rules of law representing titles to land."

And the Committee go on in the fourth Report (p. 265) to add: "Though of late years it has been thought fit, on claims of peerage in some cases, not to put the questions to the judges for the opinion of the House directly on the subject in doubt, but to ask questions on supposed cases of law, from the answers to which inference might be drawn and which might be applied to the dignity the right to which was under discussion, the ancient practice of the House was otherwise. And perhaps the answer given in this case to the question may lead to a doubt whether the ancient practice was not preferable. It may be also observed that a grant of a dignity to one of the heirs of his body or the heirs male of his body is applied to a subject very different from a grant of an estate tail in land. And the Committee who made the Report of the 29th July, 1822, have noticed that allusions to the rules of law representing estates in land, in considering questions representing dignities, have a tendency to mislead the judgment

of the House in all cases, and especially when applied to the dignity of a peer where that dignity has been created by the Crown and cannot be claimed as incident to the tenure of land. . . . According to the law of England, at least as now understood and perhaps as always understood, a dignity simply cannot be granted in fee simple[!]. It can be granted only to a person described in the grant, and to the heirs general or special of his body. . . . A grant of a dignity to a man and the heirs of his body general or special bears, therefore, no resemblance to a grant of land to the same man and the heirs of his body general or special."

The unsettling effect of the doctrines thus enunciated was soon illustrated in the *Devon Case*, 1831 (2 Dow & C. 204). The question raised in that case was as to the validity of the grant of a peerage to a man and his heirs male for ever, and the Redesdale Committee's Reports were relied on to prove that dignities are not governed by the same rules of law as land, but that the Crown's power in relation to them was absolute, on the principle "*cujus est dare ejus est disponere*," and in the result the Committee for Privileges came to the erroneous conclusion that the limitation was valid, and the House adopted that conclusion.

Then came the grant in 1856 to Lord Wensleydale of a life peerage, and the attempt to obtain for him a seat in the House accordingly. It is needless to say that great reliance was placed on the Reports of the Redesdale Committee, seeing that in effect those Reports recognized the validity of such a peerage; but the House of Lords dissented from those views, and decided that, whatever the operation of the grant, it conferred on the grantee no right to a seat in the House of Lords.

So in the *Willes Peerage Case* (L. R. 4 H. L. 126), the views of the Committee and the *Devon Case* (*supra*) were relied on to establish the validity of a limitation to a man and his "heirs male for ever." But the House decided contrary to those views, and held that a limitation of a peerage must conform to the law applicable to land.

Again, in the *Buckhurst Peerage Case* (1864), the presence in the grant of the shifting provision was, no doubt, the indirect result of the Redesdale Committee's reports, and of the repeated assertions in them that the Crown's right was uncontrolled, and that the rules as to peerage grants had no relation to the rules as to grants of land. But the House of Lords held the shifting provision illegal.

Implied or Presumed Limitations.

In the case of a barony by writ, the law (the intention of the Crown not being expressed) implies a limitation to the person summoned and the heirs of his body, and it may be that where a peerage is by charter

Implied or
presumed
limitations.

or letters patent granted to a person named without any words of inheritance, the grant should be treated as a grant to the person named in fee simple or in tail general. This appears to have been the view taken by Lord St. Leonards in the *Wensleydale Peerage Case* (5 H. L. C. 964). There his Lordship, referring to the grants to Sir J. Cornwall in the time of Henry VI. without any words of inheritance, said: "In one case the creation was without words of limitation, so that it might have operated as a creation with descent to heirs general, and both creations were made by assent of Parliament."

Summons as
earl without
more.

Where a man was summoned as an earl and there is no other explanation, it should seem that if he sat he should be taken to have been duly created an earl, that is, by parole with investiture, and his admission to sit should be treated as a recognition by the House of Lords of his title.

But there may in some cases be an explanation of the summons sufficient to show that it was not intended to create a new earldom, as, for example, where the party summoned held a Scotch peerage. There were several cases of this kind in the time of Edward I. and Edward II. "It does not appear," says the Redesdale Committee (third Report, p. 171), "that Robert de Umframville, summoned by the appellation of Earl of Angus in the 25th of Edward I.; David de Strathbolgie, summoned by the appellation of Earl of Athol in the 15th of Edward II.; or Henry de Beaumont, summoned by the appellation of Earl of Buchan in the reign of Edward III., had any patents of creation as earls by those names of dignity in England. They had respectively the dignities of Earl of Angus, Earl of Athol, and Earl of Buchan in Scotland; all of them had lands in England denominated baronies, and Umframville and Beaumont had been summoned as barons before they were summoned by the names of earls. The son of the Earl of Buchan, having lost his dignity in Scotland, was, in the 16th of Edward III., summoned only as John de Beaumont amongst the other barons."

So in the reign of Edward I., Ralph de Monthermer, who had married the widow of the Earl of Gloucester, was summoned to Parliament as Earl of Gloucester; but this summons does not seem to have been regarded as creating an earldom in his favour, for on the death of his wife, Gilbert, her son, having attained twenty-one years of age, was summoned to Parliament as Earl of Gloucester, and Ralph de Monthermer was subsequently summoned by the name of Ralph de Monthermer only. (See Chap. IX. as to Courtesy.)

Sits under
void patent.

Again, if the summons is in respect of a void patent and the person summoned sits, there is a question arises whether the Crown should be treated as having, contrary to the intention expressed in the patent,

granted him an earldom in fee simple or in tail general, or created him a baron by writ. Lord Chelmsford, in the *Willes Peerage Case* (L. R. 4 H. L. 126), appears to have considered that where there was a void grant, as, for instance, to A. and his heirs male for ever, and the grantee was summoned pursuant to that grant and sat in the House of Lords, the grant might operate only as a grant for life; but this seems unsound. Perhaps the true view is that in such a case the person summoned, if already a peer, takes nothing by this void grant, but, if not already a peer, becomes a baron by virtue of the summons and sitting. (See as to this the *Norfolk Peerage Case*, 1907 (A. C. 10).)

There is, however, another class of cases in which it is necessary and proper to imply the limitation where there is no record of the nature of it, namely, in the cases of the ancient earldoms granted by parole, and evidenced by investiture, by girding with the sword.

Ancient earldoms. Girding; what limitation implied.

In such case it would seem that the girding ceremony must be taken to have conferred a peerage in fee simple, or at any rate in tail general. It is certain that some of the older earldoms created apparently by simple girding did in fact descend, and we can scarcely suppose that these were exceptional cases, or that some earldoms were granted for an estate of inheritance and others for life only. The fair presumption is that, in the absence of any express declaration of the royal will, the ceremony of girding impliedly limited an estate of inheritance in the dignity; for as a grant for life of a peerage would have been invalid, it seems reasonable to assume that the Sovereign, in creating a peerage, did what was necessary to make the grant valid; that is, limited the requisite estate of inheritance, just as where a man sits in Parliament as a temporal peer it is presumed that he was duly summoned to Parliament as such. (*Hastings Peerage Case*, 8 Cl. & Fin. 144.) The only question is whether the implied limitation should be in fee simple or tail general or tail male.

Fee simple was the ordinary common law limitation, and, as we have seen, the earliest charters of creation limited the dignity in fee simple. This was the limitation in the charters of Stephen and Maud, and was the usual limitation until the time of Edward II. In the absence, then, of any evidence in favour of a limitation in tail general or tail male the presumption seems to be in favour of fee simple.

CHAPTER VII.

DESCENT OF PEERAGES.

Common law
rules of
inheritance,
qualified &c.
by special
rules, apply.

The special
rules.

Tracing title
from grantee.

*Possessio
fratris.*

Female
co-heirs.

Acceleration
in case of son.

THE descent of a peerage in England is, and from time immemorial has been, governed by the common law rules of inheritance; but a peerage is a very special kind of inheritance, and, in view of this fact, the common law, whilst applying its rules of descent generally to peerages, has qualified or supplemented them by certain special rules appropriate to the peculiar character of hereditary dignity. The following are the special rules in question:—

1. That whereas in the descent of a fee simple estate in land the title (prior to the Inheritance Act, 1833) had to be traced from the person last seised—*seisina facit stipitem*—the title in the case of a peerage, whether in fee simple or fee tail or otherwise, has to be traced, and always has had to be traced, from the original grantee, or, in the case of a peerage, by way of remainder from the original grantee in remainder.

2. That accordingly the doctrine of *possessio fratris* does not apply, and never has applied, to peerages.

“Of dignities,” says Coke (Inst. I. 15 b), “whereof no other possession can be had but such as descend (as to be a duke, marquess, earl, viscount or baron) to a man and his heirs there can be no possession of the brother to make the sister inherit, but the younger brother shall inherit the dignity inherent in the blood as heir to him that was first created noble.”

3. That, whereas in the case of land and various other hereditaments granted in fee simple or fee tail where the heir entitled, according to the ordinary rules of descent, consisted of several females or persons claiming through them, they take, and always have taken, as coparceners, in the case of a peerage, which is an impartible hereditament of exceptional character, the peerage, instead of descending to the co-heirs, passes into abeyance, and remains in abeyance until the abeyance is terminated in accordance with law.

4. In certain cases the descent of a peerage to a son and heir apparent in his parent's lifetime may be accelerated by writ of the Crown. (See Chap. VIII.)

These special rules, differentiating the descent of a peerage from the descent of land and other hereditaments, will be examined in greater detail later on. (See p. 98 *et seq.*)

Turning from these special rules to the general principles of descent applicable to peerages, the leading rules may be summarised as follows :—

General rules of descent.

In the case of peerages expressly or impliedly granted in fee simple or fee tail general and in the case of baronies by writ :—

1. The inheritance primarily descends lineally to the issue of the grantee.

Descent to lineal issue.

2. The male issue are preferred before the female. Thus a son excludes a daughter.

Precedence of males.

3. As between two or more of the male issue standing in equal degree of consanguinity to the grantee, the elder or eldest succeeds as heir ; in other words, the rule of primogeniture between male heirs prevails. Thus, the eldest son stands first, and if he dies without issue then the second son takes as heir, and so on.

Eldest in case of equal degree.

4. All the lineal descendants *in infinitum* of any person deceased represent their ancestor—stand, that is, in the place in the line of descent in which the deceased would have stood if he had been living. Thus, if the eldest son of a peer dies in the lifetime of his father, leaving issue, the heir is to be found among such issue, and accordingly, if the issue comprises several sons, the eldest (under rule 3) succeeds.

Lineal succession.

5. In the case of fee simple inheritances, if the issue of the grantee is exhausted the title passes to the collateral relations of the grantee. Such failure of general issue has, however, been of such rare occurrence in the history of the peerage that this rule need not detain us.

Fee simple grant.

In the case of a peerage limited in tail male :—

Grant in tail male.

1. The inheritance devolves in accordance with the above-mentioned rules 1, 3, and 4, with this exception, that females cannot inherit or transmit to their issue a right to inherit. Males, in other words, can only inherit if they claim through males. Thus, if the peerage is granted to A. and the heirs male of his body, and A. dies, leaving daughters only, the peerage becomes extinct ; so if A. leaves sons, and the eldest of such sons dies, leaving only a daughter, she acquires no title, and A.'s second son takes.

2. So again, if the grant is in tail special, *e.g.*, to A. and the heirs (or the heirs male) of his body by B. his wife, the descent in such case is confined to the line of heirs coming within the limitation, who alone are inheritable.

Grant in tail special.

As regards peerages in remainder, *e.g.*, to A. and the heirs male of his body with remainder to B. and the heirs male of his body, the title of the remainderman depends on the extinction of the prior estate. Upon that extinction the peerage devolves on the remainderman, or if

Peerages in remainder.

he is dead, on his heir, under the limitation of the grant ascertained in accordance with the above rules.

Limitation to A. and heirs or heirs of body.

And here it may be well to refer to the long-settled rule of construction, that where there is a limitation to A. and his heirs, or to A. and the heirs of his body, the word "heir" or "heirs of the body" are in contemplation of law words of limitation, and not of purchase; that is to say, they mark out the extent of the estate taken by A., and do not in A.'s lifetime vest anything in his heirs. Hence if A. forfeits his inheritance his heir will not succeed.

Special rules explained.

Reverting now to the special rules already given (p. 96), a few more remarks may be made in elucidation of their origin and operation.

Title to be traced to grantee.

As to the necessity for tracing the title to a peerage to the original grantee. This principle was recognized in the *Grey de Ruthyn Case*, 1640 (Collins' Claims, 256). The question under consideration was whether the doctrine of "possessio fratris" applied to a barony by writ, and Brampton, C. J., in delivering the opinion of the judges that the doctrine did not apply, gave divers reasons, and, amongst others, the following: "Another reason why it is there can be no 'possessio fratris' of a barony is the title to every barony must be by record; baron or no baron must be tried by record; so that whosoever shall make a title to a barony must resort to the record, and begin his title there, and so, consequently, must make himself heir to the person first ennobled by that record, which the daughter cannot do, for she is not heir to the first ancestor, but the brother of the half-blood."

The principle thus laid down by Brampton, C. J., holds good of all kinds of peerage. The creation of a dignity by writ and sitting by charter, patent or otherwise, must be established, and the title then traced by descent from the original grantee in accordance with the particular limitations of the peerage claimed. No doubt it is not possible to show that this has always been the law since the time of Henry III., but inasmuch as it has been recognized as the common law in modern times it may be assumed in accordance with the principles recognized in the *Norfolk Peerage Case*, 1907 (A. C. 10), that the same rule has always prevailed.

Possessio fratris.

The rule of "possessio fratris" was summed up in the maxim, "Possessio fratris de feodo simplici facit sororem esse heredem," which, being interpreted, meant that if an owner in fee simple of land married twice, and, dying, left a son and a daughter by the first wife and a son by the second wife, and the son by the first wife succeeded to the inheritance, entered and afterwards died without issue, the inheritance passed, by reason of his possession, to his sister of the whole blood and could never pass to his brother of the half-blood.

The doctrine did not, however, apply to an inheritance in tail (Co. Litt. 15 b), nor did it apply to every kind of inheritance. "Of

dignities," says Coke (*ibid.*), "whereof no other possession can be had but such as descend, as to be a duke, marquis, earl, viscount or baron, to a man and his heirs, there can be no possession of the brother to make the sister inherit; but the younger brother, being heir to the father, shall inherit the dignity inherent in the blood as heir to him that was first created noble."

The question whether the view thus expressed by Coke was correct or not was raised in the *Grey de Ruthyn Case* in 1640. (See Collins' *Claims*, 195.)

The claim in that case was to a barony by writ—Grey de Ruthyn—created *temp.* Edward III., and the claimant was Charles Longvile. The barony had descended to Edmund de Grey, who was created Earl of Kent in tail male in 1465. Both barony and earldom afterwards descended in due course to Henry Earl of Kent, who died without issue in 1639. Thereupon the earldom passed to Anthony, the cousin of the deceased earl, but the barony was claimed by Charles Longvile, who was a nephew of the deceased, being a son of his half-sister, as heir general of the first baron. The claim was opposed by Anthony Earl of Kent, who contended that the barony had been attracted by the earldom, and passed accordingly to him. The case was elaborately argued by Selden and Dugdale for the petitioner, by Serjeant Rolls for the Earl of Kent, and by Sir John Banks, the Attorney-General, for the King. The judges were consulted by the House of Lords, and Brampton, C. J., delivered their opinion 1st February, 1640. (*Grey de Ruthyn Case*, 1640, Collins, 255; *supra*, p. 98.) "I think," said his Lordship, "that a barony is such a hereditament as the maxim of 'possessio fratris' doth not extend unto. The maxim of 'possessio fratris facit sororem esse heredem de feodo simplici' doth not extend to every hereditament. There are many hereditaments which are properly and only determinable at the common law that this maxim extends not unto. It extends only to such hereditaments whereof a possession may be gained. A possession may be gained two ways—by entry or by pernancy of profits . . . so that a hereditament whereunto there can be no entry, or which doth not naturally yield any explees, any fruit or profit, of such an hereditament the rule of 'possessio fratris' cannot hold, because the possession cannot be gained of such a hereditament neither by entry or pernancy of profits. . . . Now a barony is a hereditament of this kind. There can be no possession gained of it, there can be no entry. It is not of that kind. It doth hold no explees, profit or other fruit. It hath been said that the sitting in Parliament may be as an actual possession. There is incident to this great dignity an office or service of great trust and honour, as jurisdiction and vote and voice in Parliament. The sitting there is but an exercise and performance of the service and not any

*Grey de
Ruthyn Case,
1640.*

profit of the honour. . . . Another reason why there can be no 'possessio fratris' of a barony is the title to every barony must be by record; baron or no baron must be tried by record; so that whosoever shall make a title to a barony must resort to the record and begin his title there, and so, consequently, must make himself heir to the person first ennobled by that record, which the daughter cannot do, notwithstanding the possession of the brother, for she is not heir to the first ancestor, but the brother of the half blood. For these reasons I think there can be no 'possessio fratris' of a barony."*

In the result the House of Lords resolved that Charles Longvile had made out his title, and he received a writ of summons and took his seat accordingly.

The same question was again considered in the *FitzWalter Peerage Case*, 1666 (Collins' Claims, 268). In that case Benjamin Mildmay claimed the peerage as heir general on the ground that the doctrine of "possessio fratris" did not apply. A rival claim was set up by Robert Cheek, who contended that the barony was a barony by tenure, and that the doctrine of "possessio fratris" did apply; that the barony had been attached to an earldom, and therefore that the claimant, Benjamin Mildmay, was not entitled. The judges were again consulted—the two Chief Justices and Chief Baron Hale—and they were unanimously of opinion that the half-blood was no impediment to the descent of a dignity to an heir general.

Abeysance.

The abeyance of peerages has been alluded to, but it will be convenient at this point to consider it with some fulness, being, as it is, one of the most important and interesting incidents in connection with the descent of a peerage.

Some preliminary propositions with regard to it may be laid down.

To what peerages applicable.

1. Abeysance, in the first place, can occur only in the descent of a peerage limited in fee simple or in tail general.

2. Abeysance, it is well settled, applies to all baronies by writ, but it is not equally clear that it applies to all degrees of peerage.

What it means.

3. The principle on which abeyance rests is that the descent of a peerage being arrested by the existence of several co-heirs, no one of such co-heirs can make an exclusive title to the impartible inheritance. A peerage in such a case does not descend, like land, to the co-heirs; it passes into abeyance, and the title to it remains for the time being *in gremio legis*; but the peerage, notwithstanding its abeyance, is still a subsisting entity.

The Crown's power to select.

4. The law, however, is not without its remedy for this anomalous situation. It vests in the Crown a power by its prerogative of selecting one of the co-heirs, or the heir of one of the co-heirs, to take the

* Collins adds: "This argument was given me by his son."

peerage, and so soon as the Crown has declared its will in this respect the peerage descends to the person thus selected. This rule is clearly recognized by Coke in relation to an earldom. "Where," says he, "there be more daughters than one, the eldest shall not have the dignity and power of the earl, that is, to be countess. What then shall become of that dignity? The answer is that in that case the King, who is the sovereign of honour and dignity, may, for the uncertainty, confer the dignity upon which of the daughters he pleases. And this hath been the usage since the Conquest, as it is said."

5. The usual mode in which the Crown has made its selection has been by causing a writ of summons to be issued to the person selected, or, if such person be a woman, by causing letters patent to be made determining the abeyance in her favour. Where the person selected is already a peer, the abeyance has also been determined in his favour by letters patent. Mode of selection.

6. The heir in whose favour an abeyance is thus terminated takes the peerage, and holds it to him and the heirs of his body—no new peerage, be it observed, but the old peerage with the old precedence. Estate after revival.

7. Where an abeyance is terminated in favour of one of the co-heirs, and subsequently the issue of that co-heir fails, the peerage goes to the next heir of the original grantee, and if such next heir is represented by several co-heirs it again falls into abeyance. Re-abeyance.

8. Abeyance will terminate without any intervention by the Crown if the title of the co-heirs by any means becomes united in one person. Thus, if the peerage falls into abeyance between several daughters, and the issue of all the daughters except one fails, the peerage emerges from its abeyance and vests solely in such daughter or her heir, and she or her heir becomes entitled accordingly. End of abeyance by union of titles.

But the attainder of one of several co-heirs is not for this purpose equivalent to a failure of the issue of that co-heir, and will not entitle the other co-heir to say: "I have now become the sole heir to the title." Attainder of co-heir.

These and other points in the law relating to abeyance have only come to be settled by slow degrees—some of them by decisions as late as the nineteenth century. Above points settled by slow degrees.

For instance, in 1626 we find the judges and the House of Lords stating the law in terms which would certainly now be regarded as erroneous or misleading. Witness the *Oxford Peerage Case* (Collins' Claims, 172), where, dealing with certain baronies in abeyance, the judges' report was—

"That for the baronies they are wholly in your Majesty's hands to dispose of at your Majesty's pleasure."

If by this the judges meant that the Crown could give those ancient baronies to a stranger they were clearly wrong, for the prerogative

goes no further than a right to prefer one of the co-heirs, or, in the alternative, to leave the peerage in abeyance; but judicial utterances as to the royal prerogative in the early days of Charles I. must be received with great reserve. To hold high notions of the royal prerogative was the only way to Court favour in those days.

However, forty years later, it is clear that the King's advisers had arrived at a truer perception of the royal power over a peerage in abeyance, for in 12 Charles II. (1660) there is recorded in the Signet Office Docquet Book a grant in which the rights of the Crown are clearly indicated. The grant, according to the record, recited the death, in 1605, of Henry Baron Windsor, entitled to a barony by writ, leaving a son (who died without issue) and two daughters, the elder married to Dixey Hickman, who died, leaving a son, Thomas Windsor; and further recited "that it belongeth to his Majesty to declare *which of the said co-heirs* shall enjoy the dignity of their ancestors"; and the grant was for the restoration and confirmation to Thomas and his heirs with the old precedence.

Emergence of
barony from
abeyance.

Another instance of the unsettled state of the law as to abeyance is afforded by the *Willoughby de Broke Peerage Case* (Cruise, 197; Collins, 321), for on the House of Lords in that case passing a resolution recognizing that a barony would emerge from the abeyance on the titles of the co-heirs becoming united in one person, the Duke of Norfolk and several other lords entered a protest expressive of dissent from the resolution, on the ground that "it seems to us to be repugnant to the judgment of the House in the case between the Earl of Oxford and Lord Willoughby d'Eresby, and referred to this House by King Charles the First, and by their lordships thought fit to be referred."

Origin of the
term
"abeyance."

The word "abeyance" does not appear to have been used in relation to peerages until the eighteenth century, but it was a term familiar to the law long before that period, and was well adapted to describe the condition of a peerage devolving on co-heirs.

In its original sense abeyance is defined in the "*Les Termes de la Ley*" (edition 1629), where it is said: "Abeyance is where a lease is made for term of life, the remainder to the co-heirs of J. S., which J. S. is living at the time of the grant. Now, by this grant the remainder passeth from the grantor presently, yet it vesteth not presently . . . but it is said to be in abeyance, or else, as the logicians have it, *in posse* or in understanding, or, as we say, in the clouds, that is, not in the consideration of the law. . . . Also if a man be patron of a church and presents one to the same, now, as the fee of the lands and tenements appertaining to the rectory is in the parson; but if the parson die and the church has become void, then is the fee to vest until there be a new parson. . . . It is in nobody, but in abeyance

till there be a new incumbent as aforesaid." A valuable (though not quite correct: see *infra*, p. 107) exposition of the term as applied to peerages is given by a very eminent judge (Eyre, C. J.) in the *Beaumont Peerage Case*, 1794—5 (Cruise, 214). The peerage in question there was a barony by writ created in 7 Edw. II., which had fallen into abeyance on the death of William Lord Beaumont, who died 24 Hen. VII., without issue, leaving an only sister, Joan. This Joan married John Lord Lovell and had a son, who died without issue, and two daughters—Joan (married to Sir Bryan Stapleton), to whom the claimant was heir, and Frideswide, who married Sir Edward Norris, by whom she had two sons—Sir John Norris, who died without issue, and Henry Norris, who was attainted 27 Hen. VIII., and to whom the Earl of Abingdon was lineal descendant. The petitioner claimed that he was heir general of Henry de Beaumont, who was first summoned, and relied on the attainder of Henry Norris as extinguishing the rights of the other branch.

The opinion of the judges was delivered by Eyre, C. J., and in the course of it he said: "A peerage is a most transcendent honour and dignity, but it is still in the eye of the law an inheritance, and it will descend to co-heirs in the same manner as other hereditaments will descend. The title of the co-heirs of a barony is that of 'unus heres unum corpus'; it is *unius juris*; they must take it, and it must vest in them as the heir of the ancestor. This inheritance stands at the head of the class of inheritances in their nature impartible, but it is an inheritance of such a nature producing fruits of dignity and of public duty, individual and incommunicable, by any of the common means which the law has provided for the enjoyment of impartible inheritances, so that when it happens to vest in co-heirs it necessarily falls into a dormant state. No single co-heir can assert a claim to it, for such a claim would be contrary to his interest; he does but participate in the inheritance. He can therefore sustain no claim to the whole of it. And this inheritance is so singularly circumstanced that even then the whole body of the co-heirs can assert no claim to it because they are incapable of possessing or in any manner enjoying it. . . . When this inheritance is in this dormant state, it is said to be in abeyance; not in the ordinary sense of the term, as was observed by Mr. Attorney-General, in which it is applied to an estate in fee simple or freehold in suspense—floating, fixing nowhere, and vesting in no one; but it simply denotes that the title to a barony which has descended upon and is vested in co-heirs remains in them in an inactive and dormant state, incapable of being asserted or being enjoyed; that none of the ordinary means provided by law for making impartible inheritances productive to co-heirs could be applied to this inheritance. One remedy, and one only, has been provided by law for the case of a

Beaumont Case.

dormant peerage. It is *sui juris* of a most extraordinary nature, but very suitable to the dignity subject to which it is applied: I mean the prerogative right of calling one of the coparceners by writ of summons to sit in the seat of his ancestor. He will from thenceforth be in the exclusive possession and enjoyment of the inheritance, and will hold to him and the heirs of his body, yet still he is but one of the co-heirs of his ancestor, and the rest of the co-heirs still remain co-heirs; and in the event of a failure of heirs of the body of that co-heir whom the prerogative hath thus preferred, the other co-heir, if but one, would take the whole inheritance, or if there were more than one the barony would again fall into abeyance. . . . I have stated what I take to be the true nature of this abeyance of the barony. It falls into abeyance, because, in point of right, no one co-heir can sustain a claim to it, and because all the co-heirs together, though they constitute a complete heir to the ancestor, cannot claim it with effect, and therefore cannot claim it at all. The effect of the prerogative right of calling one of the co-heirs to sit in the seat of his ancestor is not to change the nature of his original title to participate in the inheritance, nor does it in any manner enlarge the quantity of his interest in the inheritance as it stood originally; it takes nothing from the title of the other co-heirs. It does not attract their portion of the heirship and unite it with that of the co-heir preferred, but it creates a title to sit in the seat of the ancestor in a great degree collateral with the title of inheritance. . . . My Lords, the nature of the prerogative right infers no capacity in the co-heir. The prerogative is, on the contrary, a provision for the incapacity of the co-heir. There is no plurality of persons capable; the plurality is of persons incapable either standing alone or even united. The abeyance is not produced by the law not knowing how to select from among incapable persons. The abeyance is because there is no one capable, and also because all are incapable; abeyance cannot determine by the removal of the plurality of persons capable, because such a plurality never existed. Abeyance determines by uniting all the detached parts of the title in one, and by that means restoring to the title activity and capacity to be possessed and enjoyed. . . . I forbear troubling your Lordships farther. The answer which the judges submit to your Lordships is, that supposing the claimant to have proved himself to be one of the co-heirs of the Barony of Beaumont, he is not entitled of right to such barony according to the state of pedigree last delivered on his part." On this advice the House of Lords resolved and adjudged that it did not appear that the petitioner was then entitled to the honour, title, and dignity of Baron Beaumont.

The claimant, Mr. Stapleton, subsequently presented another petition, praying that the abeyance might be determined in his favour.

This petition was also refused, but later on the abeyance was determined in favour of Mr. Stapleton's cousin and heir, 16th October, 1840.

Some of the observations of Eyre, C. J., no doubt require revision, in view of the subsequent decision in the *Camoy's Peerage Case*, 1838 (6 Cl. & Fin. 789).

There, also, the petitioner was the descendant of one of several *Camoy's Case*. sisters who were co-heirs; a descendant of one of the other sisters had been attainted, and it was argued that the *Beaumont Case*, therefore, was fatal to any claim by this petitioner. The Committee for Privileges sat to consider the question of law as to the effect of the attainder, the judges being present, and on 15th January, 1839, the opinion of the judges was delivered by the Lord Chief Justice Tindal, who said: "My Lords, the general rule by which the abeyance of the dignity or title of honour is governed was not disputed at your Lordships' bar; it has been, indeed, the established and undoubted law upon this subject from a very early period of our history, that in a case of a barony descendible either to the heirs general or to the heirs of the body if the baron die leaving only daughters or sisters or other co-heirs, the dignity is in abeyance so long as more than one of such co-heirs is in existence, but so nevertheless that the Crown, the Sovereign of honour and dignity, may at any time during abeyance determine it by conferring the dignity on whichever of the co-heirs it pleases; but if the Crown do not exercise such prerogative, and the lines of all the co-heirs but one become extinct, then the abeyance is at an end, and such only surviving co-heir is entitled as a matter of right to the enjoyment of the dignity.

"Lord Coke, indeed, in his first Institute seems to think that such has been the law from the time of the Conquest (Co. Litt. 165), but it has at all events been acted upon at the least as early as the reign of Henry VI." . . . The Chief Justice then pointed out that it was contended on the one part that the attainder of one co-heir operated as a forfeiture or extinguishment of the dignity as to all on the one hand, and on the other that such attainder could have no effect, but at the utmost restrain the Crown from conferring the dignity on any descendant of the attainted line so long as the corruption of blood by means of attainder continues. And after referring to what the Lord Justice Eyre said, that the title of co-heirs to a barony is that of *unus hæres* and *unus corpus* combined:

" . . . Now, before entering upon any discussion of the points submitted to us, it is to be observed that this dictum of Lord Justice Eyre, upon which so great reliance has been placed, was not in any way necessary for the determination of the question put upon that occasion by your Lordships' House to the judges. The question submitted to them was whether, supposing the claimant to have proved

himself one of the co-heirs to the Barony of Beaumont, he was then entitled of right to the barony, or, in other words, whether one of two co-heirs was a complete heir to the ancestor?—a question which the judges necessarily answered in the negative. But this answer must equally have been given by them whether the dignity had vested in the co-heirs, or whether it had, by means of its being in abeyance, become vested in the Crown. . . . The observation, therefore, to whatever weight it may be entitled as coming from so great a judge, is not to be considered as bearing the same stamp of authority as the opinion of the judges expressed on the further point on which they were called to advise. Now it is obvious that the whole strength of the position advanced by the Attorney-General must depend on these two data: first, that when a barony is in abeyance, the share of each co-heir in such barony descends to, and vests in, such co-heir; and, secondly, that the attainder of any one co-heir operates as a forfeiture of the part so vested in him, for if either of these data fail, &c. . . . Further, the peculiar nature of the inheritance in a dignity or title of honour has an important bearing on the question whether it is capable of vesting in co-heirs.” [And then after pointing out the impossibility of co-heirs taking the barony, seeing that they cannot enjoy it by turns or otherwise,] “the reason, therefore, fails for holding that they can take the inheritance of the barony, when they cannot take it for any available purpose. And this consideration at the same time fortifies and confirms the doctrine of abeyance as understood in ancient times, which placed the inheritance anywhere rather than in the co-heirs.” [Then he refers to what Lord Coke said, that the King, who is the Sovereign of honour and dignity, may for the uncertainty confer the dignity upon which of the daughters he pleases. And again refers to Whitlocke, who says that the King may revive the honour in the issue, or suffer it to lie in abeyance, and he infers, therefore, that it does not descend, especially as the writ of summons to one of the co-heirs cannot be supposed to drag it out of the others.] . . . “Now, if it be the law that the barony does not descend to the co-heirs and vest in each in separate parts, there is at once an answer to the question whether, whilst the dignity is in abeyance, the attainder on one of the co-heirs shall operate as a forfeiture or extinguishment of such dignity, for upon that supposition there was nothing in the person attainted which could become the subject of forfeiture, &c. . . . that all dignities or titles of honour, whatever be the established rule, are forfeited and lost by the attainder of the possessor for high treason is undoubted law. ‘Is it not,’ as has been justly asked by Mr. Charles Yorke in his considerations on the law of forfeiture (p. 30), ‘both natural and politic that a distinction bestowed only for the praise of them who do well should be forfeitable on the commission of crime

for a terror to evildoers? &c. . . .’ Upon the whole, although I should not be justified in making my learned brethren responsible for the precise grounds upon which I have endeavoured to support their opinion and my own, yet I have their full authority to declare our unanimous answer to the question proposed to us as follows:—First, that it is competent to the Crown to determine the abeyance in favour of A. Second, that it is competent for the Crown to determine the abeyance in favour of B.” The Lord Chancellor, Lord Cottenham, alluding to the attainder, said: “I do not again advert to that point further than to observe that it was the subject of consideration and of argument before learned judges—and your Lordships have had the unanimous opinion of all the judges that were present at that discussion, entirely agreeing with the opinion which I myself formed, that there is no impediment to the claim, either of the collateral branches or even of those who claim through the attainted line; the corruption of blood having been removed by Act of Parliament.”

The claimant.

Another co-heir.

This view of the law was accepted by the House, and must be treated as having overruled the opinion to the contrary expressed in the *Beaumont Case* (*supra*, p. 103). And the petitioner having established his title as one of the co-heirs, the peerage was called out of abeyance in his favour.

There have been several subsequent cases in which an abeyance has been determined, as, for example:—The *Brays Peerage Case*, 1839 (6 Cl. & Fin. 757); *Hastings Peerage* (8 Cl. & Fin. 144); *Fitzwalter Peerage* (10 Cl. & Fin. 846); *Wharton Peerage* (12 Cl. & Fin. 295); the *Mowbray Peerage Case* in 1877.

Other cases of determination of abeyance.

The *Mowbray Case* deserves special attention. There the barony claimed was a barony by writ created in favour of Roger de Mowbray, 11 Edw. I. It had fallen into abeyance in 1477, was called out of abeyance apparently in the time of Richard III., and fell again into abeyance in 1777. In 1877 the Crown determined the abeyance in favour of Alfred Joseph, second Lord Stourton, one of the co-heirs. He had previously petitioned that the abeyance might be determined in his favour, and the House of Lords had reported that he was one of the co-heirs.

The further proposition that a peerage which has fallen into abeyance will, on the divided titles becoming united in one person, emerge from abeyance *ipso facto*, was not finally established without a struggle. The point arose incidentally in connection with the claim of Sir Richard Verney to the Willoughby de Broke peerage (Cruise, 197; Collins, 321). And it is referred to in the Journals of the House of Lords as follows:—“Whether if a person summoned to Parliament, and sitting, die, leaving issue two or more daughters who

Emergence from abeyance by union of titles.

all die, one of them only leaving issue, such issue has a right to demand a summons to Parliament. And it was resolved in the affirmative." (See the Journals of the House of Lords, Vol. 15, p. 522.)

A protest against the resolution was entered by the Duke of Norfolk and several other peers, the principal ground of the protest being, apparently, that once a peerage had fallen into abeyance it could not emerge without the action of the Crown. The resolution, however, represents the law, and has ever since been acted on. It was relied on in support of a further claim made by Sir Richard Verney to the Willoughby de Broke peerage. This claim was referred to the House, decided in the claimant's favour, and he received a writ of summons accordingly.

Since then the principle of a barony emerging from abeyance has been recognized in a number of cases, among which may be mentioned :—

The *Clinton Peerage Case* (Cruise, 208), where the barony was created in the reign of Edward II.

The *Conyers Peerage Case* (Cruise, 209).

The *Powis Peerage Case* (Cruise, 211).

The *Howard de Walden Peerage Case* (Cruise, 212).

Descent of Earldoms in the Case of Females.

Redesdale
Committee's
objections to
female descent
of earldoms.

On this subject, as on others, the Redesdale Committee have propounded in their Reports some novel theories or suggestions which call for comment. One theory is that the law does not favour descent to females, so far as regards earldoms. Another is that earldoms differ from baronies by writ in that if the heir to an earldom is a female she cannot take without the sanction of the Crown. A third theory is that where several females are the heir the earldom, instead of falling into abeyance as a barony by writ does, becomes extinct.

All these suggestions may be found formulated with more or less clearness in the pages of the Redesdale Committee's Reports. Thus in the third Report (p. 169) the Committee say: "The history of the dignity of Earl of Lincoln tends to confirm the supposition that in those times (*temp.* Henry III.) the succession of the descendants of females to the dignity of earl was considered as depending wholly on the pleasure of the Crown."

A few pages later (p. 176), referring to the recognition in 8 Edw. III. of Hugh Courtenay's title to the Earldom of Devon by female descent, the Committee add: "Probably some similar recognition on the part of the Crown, as a matter of grace and favour rather than of right, was formerly deemed necessary when, in any family, a dignity had

been granted to heirs general, and one or more females or persons claiming through females became heir or heirs of the original grantee; and it is difficult otherwise to account for the many instances in which dignities granted to a person and his heirs generally have ceased, notwithstanding the existence of heirs general or even a sole heir female of the body of the grantee."

And again (at p. 177), after calling attention to the fact that an Earldom of Gloucester was granted in 1337 to Hugh de Audeley in 11 Edw. III., he having married one of the three sisters and co-heirs of Gilbert de Clare, 8th Earl of Gloucester, under an earlier creation, no doubt in fee simple, the Committee say: "If the dignity of Earl of Gloucester had been considered as in abeyance between the three sisters and co-heirs of Gilbert de Clare, the wife of Hugh de Audeley might have been declared by the King Countess of Gloucester, according to the opinion now prevailing on that subject. But the idea of a dignity resting in abeyance between the co-heirs does not seem then to have generally prevailed, or, at least, it seems not to have been generally acted upon; but in such cases the King seems to have sometimes given the dignity to the husband and the heirs of his body by his wife. . . . From this and many other corresponding circumstances there seems ground to infer that the dignity of peerage was not at that time considered as capable of being claimed as the right of a female by descent; but on failure of heirs male, whether there was only one or there were many heirs female, the dignity was considered as in the King's disposal. The contrary seems now to be settled, in all cases, by the decision of the House on the claim of Sir Richard Verney to the dignity of Willoughby de Broke before stated. But if the law was anciently considered otherwise (and the decision on the first claim of Sir Richard Verney seems to show that even then there were different opinions on the subject), this may, perhaps, be worthy of attention," &c.

Similar arguments were used in the *Norfolk Peerage Case*, 1907 (A. C. 10), in opposition to the petitioner's claim. (See *infra*, pp. 123, 124.)

It is difficult to support the suggested distinction between earldoms and baronies on any principle. The common law of England, according to Blackstone, so far from leaning against women, favours them highly. From the Conquest down women have been regarded as capable of inheriting all kinds of hereditaments. Even the Crown itself, the highest of all dignities, has again and again passed to women, for England knows no Salic law.

Comments on
Committee's
views.

If, then, a barony by writ may descend to a woman, as undoubtedly it may, why not an earldom? What possible distinction can, in reason, be drawn between the two? A barony is a peerage, so is an

earldom; a barony is an impartible inheritance, so is an earldom; a barony involves the duty of giving advice to the Sovereign, so does an earldom.

A distinction has been sought in the fact that an earldom was originally an office, and this official character of the dignity has been thought to explain why an earldom should not be treated as descendible to females; but, as we have seen, whatever official character an earldom may have at one time possessed, it is clear that all trace of such official character disappears soon after the Conquest.

Another suggested ground of distinction is that the third penny of the pleas granted in early times on creation of an earldom (*supra*, p. 34) was of the essence of an earldom—that a woman could not take this third penny, and was therefore debarred from succeeding to the earldom. But this argument rests upon a misconception, for it is clear that the third penny was not of the essence of an earldom; it was a mere incident of the dignity. Many earldoms were, in fact, granted without the third penny. The true reason why a woman could not take the third penny was, that it was granted to be taken in the name of the earl; and a woman not being an earl, the privilege was suspended until there was an earl.

But the main difficulty which the opponents of female claims have to meet is one not of theory but of fact. They must account for the fact that the descent of earldoms to women was in early days far from being regarded as an impossibility; that in several recorded instances women did succeed to earldoms, and transmitted the dignity to their heirs—a state of things wholly inconsistent with the theory of female disqualification.

There is equally little reason for treating the doctrine of abeyance as inapplicable to earldoms, although it is applicable to baronies.

A barony, it is well settled, falls into abeyance when there are several co-heirs, *e.g.*, several daughters only, and why? Because no one of the co-heirs has a complete title to the impartible inheritance; the inheritance, therefore, cannot descend, and remains necessarily in abeyance until either the Crown determines the abeyance in exercise of its prerogative right, or until the abeyance determines by the union of titles in a single claimant.

These reasons for abeyance of a barony apply with equal force to an earldom. In both the descent of the dignity is liable to be broken by co-heirs. Why, when the circumstances are similar, should the law preserve the barony and extinguish the earldom? Such a distinction is little consonant with the good sense of our English law, and it is idle to say that the doctrine of abeyance in regard to earldoms was not clearly established in early days, for the same may be said of the application of the doctrine to baronies. In both cases the doctrine was

no doubt in process of development. The law was not clearly ascertained; it was finally worked out by the modern decisions. But on general principles those modern decisions must be taken to settle the law retrospectively in its matured form, and with all its incidents, and therefore to show what the law was in early times—certainly from the reign of Henry III.—although lawyers living in those times were in doubt as to the law. But pending the process of development and ascertainment, all we can expect to find are indications that this doctrine of abeyance was to some extent recognized in regard to earldoms in early days—indications not very clear or precise, but sufficiently convincing—sufficient, at any rate, to show that the non-applicability of abeyance to earldoms was certainly not the recognized law.

What militates very strongly, moreover, against these theories of female disqualification in regard to earldoms, and of the non-application of the doctrine of abeyance, is that such theories are wholly unknown to the most eminent writers on the subject, legal and antiquarian. Littleton, Coke, Selden, Madox, Dugdale, Cruise, and a multitude of other learned authorities, make no mention whatever of any such disqualification in the female sex; the Rolls of Parliament are equally silent on the subject, and only within the last few years the Crown, on the advice of the late Lord Rigby when Sir John Rigby, A.-G., one of the most learned lawyers of his generation, has acted on the assumption that no such disability exists. (See *infra*, p. 120.)

Authorities
against
female dis-
qualification.

In support of this view—that females were not disqualified in the past from inheriting and transmitting to their posterity the right to inherit earldoms, and that the doctrine of abeyance was in the past recognized as applicable to earldoms—some cases may be here referred to.

Richard de Clare, Earl of Hertford, married Amicia, daughter and ultimately sole heir of William, Earl of Gloucester. He was one of the celebrated twenty-five barons appointed to enforce the observance of Magna Charta. He died 1218, and was succeeded by his son Gilbert, who inherited from his mother the Earldom of Gloucester, and was recognized accordingly.

Gloucester
Case.

Henry de Newburg was created Earl of Warwick by the Conqueror, or his son Rufus (see third Report, 155), and was succeeded by his son Roger, who lived *temp.* Stephen. Roger's grandson Thomas dying without issue (26 Hen. III.), left Margery, his sister, his heir. She was then the wife of John Mareschal, and afterwards of John de Plessitis. She was styled Countess of Warwick in a writ (28 Hen. III.), and was recognized generally as countess. (See third Report, 156.)

A case specially interesting as a recognition of the right of female

Devon.

inheritance is that relating to the Earldom of Devon (8 Edw. III.). There had been Earls of Devon from the time of Henry I., in whose reign Richard de Redvers was created Earl of Devon, with the third penny of the pleas of the county of Devon.

No patent of this peerage is on record, and the limitations are unknown, but it seems probable that the grant was in fee simple, like the grant of Stephen and Maud made soon afterwards.

Richard died in 1137, and was succeeded by his son Baldwin de Redvers. His descendant, the eighth earl, died in 1262 without issue, when Isabel, his sister, became Countess of Devon. She married William, Earl of Albemarle, who died, without issue surviving, in 1293. Thereupon Sir Hugh Courtenay, grandson of Robert de Courtenay by Mary de Redvers, daughter of the sixth earl, became heir of the original grantee, but for some reason he did not claim the title, though he continued to receive the third penny of the pleas. In the early years of Edward III., however, a question was raised as to his right to the third penny, and ultimately in 8 Edw. III. the King directed him to assume the title of earl. The direction was given not by letters patent but by a close letter, and the terms of the letter, translated into English, indicate very clearly that it was not a creation but a recognition of the title, having descended to him through his grandmother, the daughter of the sixth earl.

Close Rolls (9 Edw. III.).

Close letter
from
Edward III.
to Earl of
Devon.

Letter addressed to Hugh de Courtney as to his taking the title of Earl of Devon :—

“The King to his beloved and trusted Hugh de Courtney, Earl of Devon, greeting.

“Whereas you petitioned us, and your petition has been laid before us and our Council, that you have for a long time been proceeded against for the recovery of 18*l.* 6*s.* 8*d.* of yearly fee of the county of Devon, which Isabel de Fort, formerly Countess of Devon (whose heir you are), and her and your ancestor received year by year of the hands of the sheriffs of that county for the time being; and you and in like manner after the death of the aforesaid countess, as being heir of the same, received it for some time, and that they stopped it for that you have never styled yourself earl, as by certification of the treasurer and the barons of our exchequer sent to our chancellry in accordance with our command has been fully ascertained. For as much as the inheritance which belonged to the aforesaid countess and her and your ancestors Earls of Devon descended to you by hereditary right and you hold that inheritance at the present time. We wishing to have regard as well to our own and the kingdom's honour

as to yours also in this behalf, we wish, and by way of entreating command, you forthwith to take up the title and style of earl, to cause that for the future you shall be called by the name of Earl of Devonshire, and we, knowing that fact, will cause to be paid you the said fee year by year just as it was customarily paid to your ancestors Earls of Devonshire."

The Redesdale Committee (third Report, p. 176) are obliged to admit that this transaction amounted to a recognition on the part of the Crown of the right of Hugh to be Earl of Devon by descent from the family of Redvers, that is, through a female, but they attempt to explain the case away.

The Salisbury Earldom.

This earldom is another example of a title derived by descent from a female. The earldom was granted in 11 Edw. III., 16th March, 1337, to William Montacute, "sibi et heredibus suis," v. 32. William's great grandson, Thomas, died 1428, leaving Alice his sole daughter and heiress. She married Richard Neville, and in 1442 (20 Hen. VI.), his title to the earldom, "jure uxoris," was recognized by the King, and the dignity was confirmed to him and his heirs, being heirs of Alice. (See the letters patent, App. No. 45.) The son of this marriage was Richard, Earl of Warwick, the Kingmaker. He left two daughters, Isabel and Anne. The former married George Plantagenet, Duke of Clarence, murdered and attainted 1477; but the daughter, and, ultimately, sole heiress of this George—Margaret Plantagenet—was restored to the dignity of Countess of Salisbury by Act of Parliament, 1513 (5 Hen. VIII. c. 12.) She was so restored as being sister and heir of blood of Edward, late Earl of Salisbury and Warwick, the son of Isabel, daughter and heir of Richard, Earl of Salisbury and Warwick (?), the son and heir of Alice, Countess of Salisbury. The Act restoring the earldom runs thus: "And that the said Margaret to the estate name degree stile and title of Countesse of Salesburie and also the heirs of the said Margaret as Erles of Salesburie be restored and enhabled." The Countess was attainted in 1539 and beheaded 1541.

The Earldom of Buckingham.

This earldom furnishes another example. It was granted in Buckingham. 1377 (1 Rich. II.) to Thomas Plantagenet, youngest son of Edward III., to hold "sibi et heredibus suis." His son Humphrey died without issue in 1399, leaving Anne, his sister and heir. She married Edmund, Earl of Stafford, and had a son, Humphrey, who became fourth Earl

of Stafford, and, in right of his mother, Earl of Buckingham. His right to the last-mentioned earldom was recognized by the Crown in 1445 (24 Hen. VI.), when the Dukedom of Buckingham was granted to him by charter. In this charter he is described as Earl of Buckingham and Stafford.

Margaret, Countess of Norfolk.

Norfolk.

Another case is the Norfolk earldom. This earldom was expressed to be granted to Thomas de Brotherton, fifth son of Edward I., in 1312, by Edward II. The limitation to Thomas was to him and the heirs of his body. He left daughters, including Margaret, who ultimately became sole heir, and thereupon immediately claimed and assumed the title of countess, and was recognized as such by the Crown and generally, and by that name was afterwards, in 1397, created Duchess of Norfolk. The recent decision in the *Norfolk Peerage Case*, 1906 (A. C.), shows, it is true, that the earldom conferred on Thomas was an invalid grant, but this does not affect the value of the case as showing that as the law was then understood there was nothing to prevent a woman from succeeding to an earldom.

Earldom of Kent.

Kent.

Again, Edmund of Woodstock, younger son of Edward I., was in 15 Edw. II. created Earl of Kent, and by that title summoned to Parliament. No charter or patent has been found, and it may therefore be assumed that he was created by investiture, as expressed in the charter granting him an annuity of the issues of the county of Kent "sub nomine et honore comitis Kanciae." He had two sons, who were successively Earls of Kent, and two daughters, the younger of whom, Joan, became sole heiress of her brothers and of her father. The Redesdale Committee, in their third Report (p. 283), say, "If the investiture of Edmund of Woodstock, in the 15th of Edw. II., by girding with the sword was considered as granting the dignity to him and his heirs general, she (Joan) may have been considered, on the death of her brothers and sister, as Countess of Kent, by virtue of that investiture." She married, first, Thomas de Holland; next, the Earl of Salisbury; and, finally, the Black Prince.

Thomas Holland having issue by her had livery of her inheritance in the 27th of Edw. III., and in 34 Edw. III. he was summoned as Earl of Kent, but died soon after. He left three sons, Thomas, Edmund, and John, all minors, the eldest, Thomas, being only ten years of age at the time of the death of his father. This Thomas was summoned to Parliament as Earl of Kent (5 Rich. II.). His mother, then the widow of the Black Prince, was still living, and he did not obtain livery of her inheritance till 9 Rich. II., in which year she died.

Thomas died in 20 Rich. II., leaving Thomas, his eldest son, then twenty-three years of age, and Edmund, his younger son. Thomas was summoned to Parliament, as Earl of Kent, in 21 Rich. II. This is a very clear instance of transmission through a female. Perhaps the summoning of Thomas as Earl in his mother's lifetime may be explained as an early instance of a son summoned by one of his parents' titles.

Cases in which Abeyance has been recognized in regard to Earldoms.

The leading case is that relating to the Earldom of Pembroke.

William de Valence, son of Hugh le Brun, Earl of March, in Poitou, by Isabel, widow of King John and mother of Henry III., was created Earl of Pembroke by his half-brother, Henry III., soon after the Battle of Lewes, 1264, when he is first so styled by Matthew Paris. His son Aymer died without issue in 1323, leaving several sisters his co-heirs. Laurence Hastings was grandson of the eldest of these sisters, and he would seem to have applied to the Crown to terminate the abeyance in his favour; and in the patent below set forth we see something very like a termination of the abeyance. The wording of the patent is no doubt peculiar, and seems to suggest that the eldest daughter had a preferential right to the dignity; but it is to be noticed that not a word is said in the patent as to creating a new earldom, or about girding with the sword, nor are any limitations declared. The obvious intention is to keep alive the old earldom, and to recognize it as vested in Laurence.

Cases where
abeyance
recognized as
to earldoms.
Pembroke.

"Edward [III.] by the grace of God King of England and France and Lord of Ireland.

Form of the
patent in the
last case.

"To all to whom these presents shall come greeting Know ye that the presage of discretion and refinement which we have conceived from the apt auspices of the youth of our most dear cousin Laurence de Hastyns deservedly induce us to advance him in those things which respect the due preservation of his honour with condescending favours. Whereas also the inheritance of Adomar de Valence of happy memory Earl palatine as it is called of Pembroke long since deceased without heir of his body begotten has devolved on his sisters to be divided proportionately between them and their heirs inasmuch as it appears that the aforesaid Laurence who succeeded the said Adomar in a part of the inheritance is descended from the elder sister of the said Adomar and as on the declaration of skilled persons whom we have consulted hereupon the prerogative of the name and honour is due to him we consider it just and due that the said Laurence

having his claim from the elder sister do assume and hold the name of Pembroke which the said Adomar held during his lifetime which name as far as in us lies we do confirm ratify and also approve willing and granting that the said Laurence do have and hold the prerogative and honour of a palatine Earl in the lands which he holds of the inheritance of the said Adomar as fully and in the same manner as the said Adomar had and held them at the time of his death. In witness," &c. [October, 1339.]

Comments of
Redesdale
Committee on
the worth of
the patent.

The Redesdale Committee in their third Report (p. 198) seek to derogate from the importance of this patent as evidence on the following grounds: "If," they say, "the dignity of earl vested in Adomar was ever considered as in abeyance between the co-heirs of Adomar, the Crown had no right, according to the decision in *Sir Richard Verney's Case* [1695], to give it to any other person than the heir of one of such co-heirs, if any such remained capable of taking the inheritance. But the dignity of Earl of Pembroke was granted by the Crown as well before the patent to Laurence Hastings, in 13 Edw. III., as after the death of John Hastings, the last Earl of Pembroke of that family, to different persons"—a comment which merely comes to this: that the rights of the Crown in such a case were not at this time (1339) fully understood. It would indeed be a wonder if they were, considering that the law on the subject was not fully ascertained until 1695.

Lancaster.

Another case sometimes referred to on this point is the Earldom of Lancaster, presumably created by girding in 1267, and thus descendible in fee simple or tail general. This earldom was granted to Edmund Plantagenet, son of Henry III. Edmund's grandson Henry, the fourth earl, created Duke of Lancaster, died 1361, leaving two daughters, Maud and Blanche. Blanche married John of Gaunt, who, as the following patent shows, was recognized as Earl of Lancaster—"time honoured Lancaster"—"jure uxoris":—

34 Edw. III.
1360;
R. C. V. 48.

"Edward [III. &c.] to the Archbishops &c. greeting Know ye that we taking into consideration how that the County of Lancaster and many castles towns manors lands and tenements with their appurtenances as well in the Counties of Lincoln and Derby as in divers other counties of our realm which had been the possessions of Henry late Duke of Lancaster and Earl of Lincoln and Derby have after the death of the said Duke some of them devolved by hereditary descent to wit to John Earl of Richmond our most dear son and Blanche his wife one of the daughters and heirs of the said Duke according to a partition made between them and Matilda the other of the daughters and heirs of the said Duke and others of them are in remainder to the said Earl and Blanche according to an appointment and grant of the

said Duke in his lifetime under a certain form. And wishing moreover to show special grace to our said son in order that he may be able more becomingly to maintain himself according to the nobility of his rank we have granted and by this our Charter have confirmed for us and our heirs to the said John now Earl of Lancaster and Richemund that he and the heirs of his body and the body of the said Blanche lawfully begotten may have for ever the returns of all writs of us and our heirs and all pleas *de vetito namio* in the lands and fees of the inheritance of the said Duke which are now in the hands of the said Earl and Blanche”

This charter is material as showing that John was recognized as earl, “*jure uxoris*,” from which a termination of the abeyance in her favour may be inferred.

There are many other cases where it is obvious that something closely approximating to a restoration of the earldom from a state of abeyance took place. We shall better understand these cases if we keep in mind the fact that the Crown not unfrequently manifested its intention of calling a peerage out of abeyance by re-granting the peerage to the husband of one of the co-heirs, with remainder to the heirs of the wife.

Re-grant of peerage to husband of a co-heir, with remainder to wife's heirs.

[TABLE

TABLE SHOWING CASES OF EARLDOMS RE-GRANTED AS ABOVE MENTIONED.

Date of death of Earl.	Name of Earldom.	Name of Earl.	Co-heirs.	Next User of Title.	Relationship to previous Earl.	Reference to R. C. Report.
1075	Huntingdon.	Waltheof ...	Three daughters, Maud.	Simon St. Lis	Husband of Maud, the senior co-heir.	Third Report, p. 132.
Before 1201	Hereford.	Mabell	Three sisters, Margaret.	Henry de Bohun	Son of Margaret, one of the co-heirs.	
1323	Pembroke.	Adomar de Valence.	Two sisters, Isabel, Joan.	Laurence de Hastings	Grandson of Isabel, the senior co-heir.	Third Report, pp. 180, 182.
1232	Lincoln ...	Ranulph de Blunderville.	Four sisters	John de Lascy, created 1232.	Husband of Margaret, daughter of Hawisia, one of the co-heirs.	Third Report, pp. 168, 169.
1232	Chester ...	Ranulph de Blunderville.	Four sisters, Maud, eldest sister.	John le Scot	Son of Maud, the senior co-heir.	Third Report, p. 130.
1243	Sussex ...	Hugh de Albini.	Four sisters	John de Warrenne, Earl of Surrey.	Brother to Isabel, the widow of Hugh de Albini.	First Report, p. 411.
1446	Warwick.	Henry Beauchamp.	One daughter, died 1448, infant, and four sisters.	Richard Neville, 1448	Husband of Anne, one of the co-heirs.	
1245	Kendal ...	Anselm Marshal.	Five sisters	William de Valence	Husband of Joan, daughter of Joan, one of the five co-heirs.	Third Report, pp. 180, 182.
1338	Norfolk ...	Thomas de Brotherton.	Two daughters, Margaret, Anne.	Margaret, Countess of Norfolk.	One of the two daughters after the death of the other.	Third Report, p. 41.
1361	Leicester.	Henry Plantagenet.	Two daughters, Maud, Blanche.	Duke of Bavaria	Husband of Maud, the senior co-heir.	Third Report, p. 135.
1361	Lincoln ...	Henry Plantagenet.	Two daughters, Maud, Blanche.	John of Gaunt had third penny.	Husband of Blanche, the junior co-heir.	Third Report, pp. 168, 169.

1361	Derby ...	Henry Plantagenet.	Two daughters, Maud, Blanche.	John of Gaunt had third penny. The third penny of Northampton went to Henry, Earl of Derby, and later on to Anne, Countess of Stafford. In her will she styles herself Countess of Northampton.	Husband of Blanche, the junior co-heir.	Third Report, pp. 134, 135. Third Report, p. 163.
1372	Northampton.	Humphrey de Bohun.	Two daughters, Eleanor, Mary.	Henry, Earl of Derby (Henry IV.), created Duke of Hereford, 1397.	Anne, who was daughter of Eleanor, senior co-heir.	
1372	Essex	Humphrey de Bohun.	Two daughters, Eleanor, Mary.	Thomas of Woodstock, styled Earl of Essex in his creation as Duke of Gloucester.	Husband of Mary, the junior co-heir.	Third Report, p. 163.
1372	Essex	Humphrey de Bohun.	Two daughters, Eleanor, Mary.	Thomas of Woodstock, styled Earl of Essex in his creation as Duke of Gloucester.	Husband of Eleanor, the senior co-heir.	Third Report.
1399	Buckingham.	Humphrey, son of Thomas of Woodstock.	Three sisters, Anne, Joan, Isabel.	Humphrey, Earl of Stafford. He received the third penny of Bucks in 1439 and was created Duke of Buckingham in 1444.	Son of Anne, one of the co-heirs, and eventually sole heir.	
1399	Essex	Humphrey, son of Thomas of Woodstock.	Three sisters, Anne, Joan, Isabel.	Henry Bouchier, created 1461 Earl of Essex, to him and the heirs male of his body.	Son of Anne, a co-heir by William, Count of Eu, her second husband, Henry, Earl of Stafford, her grandson by her first marriage, being alive.	Third Report, pp. 121, 123.
1471	Salisbury.	Richard Neville.	Two daughters, Isabel, Anne.	George, Duke of Clarence, created 1472, to him and heirs of his body.	Husband of Isabel, the senior co-heir.	
1471	Warwick.	Richard Neville.	Two daughters, Isabel, Anne.	George, Duke of Clarence, to him and heirs of his body.	Husband of Isabel, the senior co-heir.	
1526	Oxford ...	John de Vere.	Three sisters. See Collins, Claims, p. 173.	Entailed by act of restoration to heirs male.	Cousin.	Fourth Report, p. 275.

Earldom of
Cromartie.

And, lastly, the Earldom of Cromartie may be cited. In that case the earldom was granted by letters patent, dated 21st October, 1861, to Anne, Duchess of Sutherland, with remainder to her second surviving son Francis in tail male, and after intervening remainders to her said son in tail general. The son of the said Francis married, and died without male issue in 1893, but leaving two daughters, Lilian and Constance. Application was made to the Crown to determine the abeyance, and under the advice of the late Lord Rigby (when Sir John Rigby, then Attorney-General, and afterwards Lord Justice) the abeyance was determined by letters patent of her Majesty in these terms :—

58 Vict. 1896. “Victoria by the grace of God of the United Kingdom of Great Britain and Ireland Queen Defender of the Faith To all to whom these presents shall come greeting.

“Whereas our right trusty and well beloved Sibell Lilian Mackenzie commonly called Lady Sibell Lilian Mackenzie sole heiress of entail in possession of the lands and estate of Cromartie in the County of Ross and Cromarty has humbly by her Petition represented to Us to the effect that We did by Our Letters Patent dated the 21st October 1861 create Her Grace the deceased Anne Duchess of Sutherland Countess of Cromartie Viscountess Tarbat of Tarbat Baroness Castlehaven of Castlehaven and Baroness Macleod of CastlecLeod and that the Petitioner's Father Lord Francis Sutherland Leveson Gower succeeded to the dignities and titles created by the said Patent in the manner set forth in the Petition and took his seat in the House of Lords as Earl of Cromartie on the 1st day of April 1889 and that the said Earl of Cromartie died without male issue on the 24th day of November 1893 leaving two daughters namely the Petitioner and her sister Lady Constance Mackenzie and that the Petitioner had succeeded as sole heiress to the Cromartie Estates as in the said Petition mentioned And that doubts had been expressed whether the title and dignities created by the said Patent devolved in favour of the Petitioner or remained in abeyance at our disposal And the Petitioner has humbly prayed us that should we be advised that the said titles and dignities were in abeyance We would be graciously pleased to terminate such abeyance in favour of the Petitioner And We having referred the said Petition to our Attorney-General for his consideration he reported thereon to Us that in his opinion sufficient evidence had been laid before him to show that the dignities aforesaid granted by Our said Letters Patent of 21st October 1861 to Anne Duchess of Sutherland namely the Baronies of Macleod and Castlehaven the Viscounty of Tarbat and the Earldom of Cromartie are now in abeyance between co-heirs namely between the Lady Sibell Mackenzie and the Lady Constance daughters of the Earl of Cromartie lately deceased

and that it being our undoubted Prerogative and right to terminate the said abeyance by admitting either of the said co-heirs (of whom the Petitioner the said Lady Sibell Mackenzie was the elder born) to the enjoyment of the said dignities We would be justified in terminating in favour of the said Lady Sibell Mackenzie the aforesaid abeyance should We be graciously pleased so to do Now know ye therefore that We of our especial grace certain knowledge and mere motion have declared and by these Presents do declare that the said Lady Sibell Lilian Mackenzie is and shall be Countess of Cromartie Viscountess Tarbat of Tarbat Baroness Castlehaven of Castlehaven and Baroness Macleod of CastlecLeod and that the said Lady Sibell Lilian Mackenzie and the heirs of her body lawfully begotten and to be begotten for ever shall be named and called Earls and Countesses Viscounts and Viscountesses Barons and Baronesses and shall have and enjoy the said Earldom of Cromartie Viscounty of Tarbat and Baronies of Castlehaven and Macleod together with all the rights privileges pre-eminences immunities and advantages and the place and precedence due and belonging thereto."

There are, on the other hand, no doubt, cases in which an heir female has apparently not asserted her title to a peerage granted or descendible to heirs general, and in which the rights of co-heirs to a peerage granted in a like form seem to have, in a sense, been ignored. But, with regard to the former, it is very difficult, if not impossible, to find any case which is of a clear and unequivocal character (see *infra*, p. 125, *et seq.*); and with regard to the latter, the cases in which the co-heirs have apparently been ignored merely go to show that the Crown did not at that date appreciate the limits of its powers in regard to a dignity in abeyance. The Crown seems at times to have acted on the assumption that where the dignity was in abeyance it was free to grant a peerage with the same title to any one it pleases, and was not bound to keep the title indefinitely in suspense on the chance that at some distant day the titles of the co-heirs might be united in a single person competent to resume the old peerage. Nor is there anything very surprising in such a view on the part of the Crown, seeing that so late as 1625 the judges in the *Oxford Case* (*supra*, p. 101) spoke of peerages being "in the disposition of the King"—an expression far too literally taken, as often happens with general propositions.

Cases of non-assertion of right by an heir female.

The following are the principal cases on which the Redesdale Committee rely in their Report as tending to negative the right of a female heir to inherit an earldom as of right:—

Redesdale Committee views.

1. **The Earldom of Lincoln.**—In this case John De Lacy had, it appears, married Margaret, daughter and heir of Robert De Quincey, Earl of Winchester, by Hawice, Countess of Lincoln, and sister and

Lincoln.

co-heir of a preceding Earl of Lincoln. His grandson left a daughter and heir, Alice. This Alice married Thomas Plantagenet, Earl of Lancaster, who was recognized as Earl of Lincoln in her right, and received the 20*l.* *pro tertio denario* granted to her ancestors "nomine comitis," and she called herself Countess of Lincoln and Salisbury till her death in 1348. There is nothing here to negative the inheritability of females; on the contrary, the case affords some evidence in favour of such inheritability.

Surrey.

2. **The Earldom of Surrey.**—Pursuing the same argument, the Committee refer, at p. 424 of their first Report, to the fact that on the death of John, Earl of Surrey (in 1347), "it was found that Richard, Earl of Arundel, was his heir, but, though heir to John De Warren, Earl of Warren and Surrey, Richard, Earl of Arundel, or his descendants never bore the title of Earl of . . . Surrey until the son of John Howard, Duke of Norfolk, was created Earl of Surrey; from which it may be inferred that, in the reign of Edward I., it was not conceived that on the death of an earl, leaving an heir female or an heir through a female, the heir was entitled as of right to succeed to the dignity of earl, though a sole heir."

Dugdale's account, however, puts quite a different complexion on the matter. He states (p. 82) that John died in 1347, 32 Edw. III., leaving Alice, his sister, wife of Edmund, Earl of Arundel, his next heir in blood; that John had in his lifetime conveyed away all his lands, including those in Surrey, to the King in fee simple; that Edmund was adjudged guilty of high treason in 20 Edw. II., and that the judgment was confirmed by Parliament in 4 Edw. III. The dignity inherited by Alice and her descendants would, therefore, be the bare title, and, being already Countess of Arundel, there was no particular reason why she should claim it; but, as a matter of fact, Courthope states that John is considered to have succeeded to the Earldom of Surrey, by which title he styled himself after the death of Joan, widow of the last earl, in 1361, and that he died in 1378, leaving (not Alice, his sister, his heir, but) a son, Richard, who forfeited his honours in 1397. This would seem to be the true version, as it appears from the Rolls of Parliament that in 1399 the Commons petitioned the King in Parliament to restore Thomas, the son of Richard, whom they describe as late Earl of Arundel and *Surrey*, and that the King in part granted the petition: "Le Roy ad fait grace au dit Thomas, Count d'Arundell, et as autres come piert de record par-aont en cest Rolle du Parlement." This petition is followed by another petition from the Commons to the King in Parliament, again describing Thomas as son of Richard, late Earl of Arundel and *Surrey*, and inheritable to various lands and tenements, and praying for a

Committee to examine the records. This petition, as appears from the Rolls, was granted by the King, and no suggestion is made of anything irregular in calling the said Thomas Earl of Arundel and Surrey. In the face of these facts, the Committee's inferences fall to the ground. The case, if anything, points to a recognition of female descent.

3. **The Earldom of Devon.**—The recognition by the King in 1334 of Hugh Courtenay's succession to the Earldom of Devon through Isabel de Fortibus, is relied on by the Redesdale Committee as affording evidence that a person claiming through a female could not succeed without some such special recognition by the Crown. Unfortunately for the Committee's argument, the recognition by the Crown, instead of being in the nature of a condition precedent to the claim, is based on the rights of the party recognized as already ascertained and pre-existing—rights which he could only have as heir to the ancient earldom claiming through a female.

A case much relied on by the Committee (third Report, p. 177) is that of the Earldom of Gloucester, granted to Hugh de Audeley, "sibi et heredibus suis," in 11 Edw. III. This Hugh had married one of the sisters and co-heirs of Gilbert de Clare, Earl of Gloucester, and left an only daughter, who married Ralph, Earl of Stafford, but, as the Committee point out, this daughter did not succeed to her father's Earldom of Gloucester; at any rate did not claim it; but the Earldom of Stafford—her husband's earldom—which had been created 25 Edw. III. in fee simple, descended to her issue, and with this dignity she may possibly have been willing or compelled to rest. She was the widow of the unfortunate favourite Gavaston, and before her marriage with the Earl of Stafford was receiving an annuity from the King, and the King in making her this allowance may very likely have stipulated that she should not advance any claim to the Earldom of Gloucester. But the dignity which she did not assume passed through a sister of hers. For in 9 Rich. II. Thomas Despenser, descended from another daughter of Gilbert de Clare, was created Earl of Gloucester.

Some instructive observations on the subject will be found in the recent *Norfolk Case*. Counsel there was arguing that where there was a grant of an earldom to a man and his heirs, or to a man and the heirs of his body, females could not take as of right under such a grant. In reference to this argument Lord Davey said: "What strikes me about this argument is this—I mention it in order that you may answer it—if you are right, and I am far from saying that you are not, it practically strikes out the heirs female from the limitations of the peerage. If an earldom is held to heirs general, the moment it

Norfolk Case, 1906.
Consideration of argument against succession of female to earldom as above.

falls upon heirs female (there being co-heirs female) it comes to an end according to that argument, so that you make it practically limited to heirs male or to a single heir female.

Counsel : I shall present to your Lordships some considerations which seem to me to justify that view. It is a view which is distinctly suggested in the Report on the dignity of a peer more than once.

Again, at p. 134 of the same case, counsel said : " There is no ground whatever for saying that an earldom was ever treated as falling into abeyance in the same sense that a barony fell into abeyance. And more than that, there is a grave doubt whether a sole female heir could ever enjoy an earldom. . . . Do you go so far as to say that no earldom has ever been held by a woman ? "

Counsel : I say that, in so far as my researches have gone, I think there are other instances where people have been described as countesses, and, of course, it might well be done now. I am not saying you cannot make a woman an earl. I do not know. I am not called upon to deal with that. . . .

Counsel : I am not here to say that the King could not grant an earldom to a countess [*qu.* woman].

Lord Ashbourne : Or that no limitations could be framed under which a woman could sit.

Counsel : Certainly I am not going to say anything of the kind. All I am concerned to say is that in point of fact the old earldoms, such as the Earldom of Norfolk, granted to a man and the heirs of his body, did not fall into abeyance in the sense that a barony does, and did not emerge from that abeyance so as to be enjoyed by a sole female heir, and that there are numbers of instances set out in that printed paper, and those which I have specially called attention to where the dealing with the earldom by the King (often with the assent of his Parliament and the assent of his judges) was inconsistent with the theory that there was an earldom in suspension, an inchoate right to an earldom resting with female heirs within a line. I do not want to advance my proposition beyond that.

Lord Ashbourne : Is there any case which you can indicate where at any period of our history an earl, with a limitation that would justify our interpretation of a woman succeeding, died, leaving one daughter, and that one daughter was excluded—that if a woman died with a limitation like that to this earldom in 1312, with only one daughter, she was treated as nothing and passed by and ignored ?

Counsel : I think there is a case of that kind, but it evidently is not so common as a case where he leaves more than one daughter.

Lord Ashbourne : But it tests the argument here. Margaret, the minute she became the sole co-heir, at once assumed and was given by all the authority one can see the title of Countess of Norfolk. Sup-

posing she was the only daughter on the death of her father, Thomas de Brotherton, in 1338, do you say she could be excluded by law?

Counsel: I say she was excluded from the only tangible right that she could enjoy, namely, the third penny.

Lord Ashbourne: I know, but can you indicate in the whole history of the peerage a case where, with the limitation such as that in the patent of 1312, a man dying and leaving only one daughter—one heiress, who would be covered by the words of the limitation—she was *ipso facto* excluded by her sex? . . .

Counsel: I believe there was a case in the peerage.

The Earl of Halsbury: There are two propositions involved: first, that there was one daughter left the sole heir; and then, that she was not treated as countess.

Counsel: Yes, my Lord, I believe that can be established in the case of the Earldom of Lincoln, and, perhaps, of Buckingham. . . .

Counsel then referred to p. 169 of the Redesdale Committee's third Report, where it is said, "This history of the dignity of Earl of Lincoln tends to confirm the supposition that in those times the succession of the descendants of females to the dignity of earl was considered as depending wholly on the pleasure of the Crown," and said—I think, perhaps, that is the safer way of putting it—that a female heir did not obtain the earldom unless the Crown chose.

Lord Ashbourne: But that would be satisfied by the pleasure of the Crown being signified in the case of several heirs. Was the pleasure of the Crown ever given to the succession of one female heir? . . .

Counsel: There are three cases. I quite agree that none of them are perfectly satisfactory, for various reasons, but take the case of the Earldom of Winchester, on p. 168 of the Report. There there was an Earl of Winchester (1207), Saiher de Quincey, who had an elder son Robert, who had a daughter Margaret, but, upon the death of Robert, Margaret did not get the earldom, but it went to a younger brother of Robert, named Roger. You may say, perhaps with truth, that that only shows the extreme irregularity of the proceedings of those early days. It may also have been thought that Margaret was incapable of taking it, therefore that there was a fresh grant to Roger.

Lord Davey: I suppose the earldom was in fee?

Counsel: Yes, my Lord.

Lord Davey: To the heirs general of the body?

Counsel: Yes, my Lord, to the heirs general.

[As to this, the material fact is omitted that Robert, the father of Margaret, did not succeed to the earldom, he being then in the Holy Land. No wonder, then, that his daughter did not succeed. Why Robert did not succeed it is now difficult to

say, but it may be inferred that he released or waived his right in favour of his younger brother, and that in those days such a release or waiver was supposed to be regular, but obviously this is not a case in which there was a female heir clearly entitled who, nevertheless, did not succeed.]

Counsel: There is a case in which one of the old Earls of Salisbury, Longsword, as he was called, who was Earl of Salisbury in Edward II.'s time, had a daughter Margaret, and she married Henry de Lacy, Earl of Lincoln, and they had a daughter Alice, who was, therefore, the sole heir to both the Earldoms of Lincoln and Salisbury. She must have been to some extent recognized as Countess of Lincoln, but to what extent is a little doubtful; that is to say, her first husband was treated as Earl of Lincoln, and her second and third husbands were not. That may have been due to some attainder. She never seems to have been treated as Countess of Salisbury; on the contrary, during her lifetime an Edward de Monte Acuto, of a different family altogether, was made Earl of Salisbury. They are not very satisfactory instances, I agree.

[As to *this case* it seems a weak one, for it appears from the third Report of the Redesdale Committee, p. 121, that "Longsword's son, William, is stated by Dugdale never to have had the title of earl, though the title is commonly given him by historians. He claimed the title, and in the 27th of Hen. III. had a grant of sixty marks annually out of the exchequer. He did not obtain judgment on his claim. Upon what ground his right was doubted the Committee have not discovered, but it seems evident that his right was doubted. William died in the Holy Land, leaving a son William, who never had the title of earl, but Margaret, the daughter and heiress of this last William, was called Countess of Salisbury, and married Henry de Lacy, Earl of Lincoln, by whom she had an only daughter, Alice, married to Thomas, Earl of Lancaster, and on his attainder Edward II. seized the inheritance of his wife, which had been conveyed to him." It follows, then, that Margaret did not succeed to an undisputed inheritance. Neither her father nor her grandfather had borne the title; no wonder, then, that she did not assume it.]

Counsel, proceeding, said: Lady Anne de Mowbray, who became the sole heiress of the Mowbrays in the time of Edward IV., and though she died quite young—a baby—she was recognized as being a person of great importance, and was married to Richard Plantagenet, and he was made Earl of Nottingham, Duke of Norfolk, and given

all the titles that she would have been entitled to if she had been a boy, but neither she nor Richard was ever called Earl of Norfolk. According to the case she would have been *de jure* Countess of Norfolk, but she never was so called.

[This is a still less convincing *case*, for as Anne died when she was a baby, she was not likely to make a claim to the dignity; and as for Richard Plantagenet, he was made Duke of Norfolk, and it may have been considered in those days that this merged the earldom. Further, the earldom in question was invalidly constituted, as now appears from the decision of the House of Lords, *Norfolk Earldom*, (1907) A. C. p. 10.]

In the above *Norfolk Case*, Sir Robert Finlay, counsel for the claimant, referring to the argument which had been put forward that in case of an abeyance an earldom reverts to the Crown, said: "They say it ceases altogether, that it goes to the Crown, and the Crown may grant it to a stranger; in fact, that it is a determination. That was very clearly illustrated by the conclusion to which my learned friend was pushed in his argument, and he had to assert that an earldom could not descend to a woman at all, that no woman could be a countess in her own right."

Argument as to an earldom reverting to Crown on abeyance.

Lord Davey: She certainly can in Scotland. I do not know about England.

Counsel: It is quite a new doctrine. May I only quote a sentence or two from the opinion of Chief Justice Tindal to show how general his language is, in 6 Cl. & Fin. at p. 851: "Further, the peculiar nature of the inheritance in a dignity or title of honour has an important bearing on the question, whether it is capable of vesting in co-heirs." He uses the general language, "dignity or title of honour," and then at the bottom of p. 852: "And this mode of reasoning agrees with the law laid down by Lord Coke (Coke upon Littleton, 165 b), namely, that the King, who is the Sovereign of honour and dignity, may for the uncertainty confer the dignity upon which of the daughters he pleases"; and again with that of Whitlocke, who says: "The King may revive the honour in the issue of either, or suffer it to lie in abeyance or unrevived." I only refer to this for the purpose of showing the language is general.

Lord Davey: I think you are entitled to say that, if there had been this distinction, so careful and accurate a judge as Chief Justice Tindal would probably have adverted to it.

Counsel: In fact, it escaped not only his attention, but the attention of every lawyer who ever lived, until my learned friends were raised up to take the point.

Lord Davey: Including Lord Justice Rigby.

Sir Robert Finlay : Yes. One always suspects a point which has escaped the industry of so many generations, and which is brought forward for the first time. I submit it is contrary, not only to the whole current of authority, but to the principle of the thing.

Tabular statements indicating disregard to certain rights.

The subjoined table shows the various cases in which the rights of co-heirs to earldoms in abeyance would appear in some measure to have been disregarded by the Crown granting earldoms with the same name to strangers, but see *supra*, p. 118.

Date of death of Earl.	Name of Earldom.	Name of Earl.	Co-heirs.	Next User of Title.	Relationship to previous Earl.	Reference to R. C. Report.
1237	Chester ...	John le Scot	Four sisters.	Assumed by Crown, and granted to Edmund Plantagenet, 1253.	No relation, being son and heir of Henry III.	Third Report, p. 130.
1175	Cornwall.	Reginald de Dunstanville.	Three daughters.	John Plantagenet, afterwards King John.	No relation.	Third Report, p. 135.
1314	Hertford.	Gilbert de Clare.	Three sisters	Edward Seymour, created 1537.	No relation.	Third Report, p. 128.
1237	Huntingdon.	John le Scot	Four sisters.	William de Clynton, created 1336—7.	No relation.	Third Report, p. 179.
1184	Northampton.	Simon St. Lis.	Co-heirs of John le Scot.	William de Bohun, created 1336—7.	No relation.	Third Report, pp. 131, 132, 180.
1389	Pembroke	John de Hastings.	Heirs of Joan.	Humphrey Plantagenet, created 1414.	No relation, being younger son of Henry IV.	Third Report, p. 181.
1382	Suffolk ...	William de Ufford.	Sisters	Michael de la Pole, created 1385.	Not a descendant of the sisters of William de Ufford.	Third Report, p. 190.
1264	Winchester.	Roger de Quincy.	Several daughters.	Hugh, second Lord Despenser.	No relation.	Third Report, p. 168.

Summary of position against the Redesdale Committee.

To sum up the position, then : The theory of the Redesdale Committee on both points would seem to be unsound. They fail to show that an earldom, granted in fee simple or fee tail general, did not, like a barony, pass into abeyance when there were co-heirs to the title, and they also fail to show that when a sole heir female became entitled to an earldom, the dignity did not pass to her as of right.

CHAPTER VIII.

WRITS TO ELDEST SON AND HEIR IN ACCELERATION.

THERE is one peculiar privilege incident to a peerage which is enjoyed by no other inheritance. It is this: That by immemorial usage the Crown has power to accelerate in certain cases the descent of the peerage, so as to make it pass during the life of the holder to his or her eldest son and heir apparent, just as if the parent were dead. This power is, however, only exerciseable where the parent is the holder of more than one peerage. Thus, if the father has in him an earldom and also a barony, the son may be called in right of the father's barony.

Writ to eldest son and heir in acceleration.

The mode in which the Crown exercises the power is by summons addressed to the son, calling him to the Upper House by the name of the peerage selected for ennobling him, and the effect is to vest in him the peerage in respect of which he is summoned.

The earliest recorded instance of an eldest son of a peer being summoned in the lifetime of his father in right of his father's barony is in 1 Hen. IV. (1399), when Henry Percy (Hotspur), eldest son of Henry, Earl of Northumberland, was summoned to and sat in Parliament, his father then being alive.

In 1483 Thomas Fitzalan, son and heir apparent of William, Earl of Arundel, was summoned to Parliament in respect of his father's Barony of Maltravers, and sat accordingly.

In 1552 the eldest son of the then Duke of Northumberland was summoned in his father's lifetime as Earl of Warwick, that being one of the peerages held by his father. Since that time there have been many other cases of a similar kind, of which it will be sufficient to cite the following:—

In 1628 the son of Viscount Conway was summoned in his father's Barony of Conway of Ragley.

In 1640 the son and heir apparent of the Earl of Kingston was summoned to Parliament in his father's barony.

In 1641 the son and heir apparent of the Earl of Bolingbroke was summoned in his father's barony.

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In 1680 the son and heir apparent of Lord D'Arcy and Conyers was summoned in the lifetime of his father in his father's Barony of Conyers.

In 1689 Robert, the eldest son of the Earl of Leicester, was summoned in his father's Barony of Sydney of Penshurst.

Descent in
case of
acceleration.

Where a son of a peer is summoned in his father's lifetime in respect of one of his father's peerages, and afterwards dies in his father's lifetime, leaving issue inheritable according to the limitations of that peerage, the peerage descends to such issue. This was what occurred in the case of the peerage of Clifford of Lanesborough. There Charles Boyle, eldest son of the Earl of Burlington, was summoned to Parliament (1689) in his father's lifetime, in respect of his father's Barony of Clifford of Lanesborough, and died in the lifetime of his father, leaving a son. The barony had been granted to his father in tail male. On the death of the son in 1694, his son Charles claimed and received a writ of summons (and was accordingly summoned).

This principle is also illustrated in the *Sydney of Penshurst Peerage Case*, 1782 (5 Brown's Parl. Cases, 549). There it was contended that in summoning an eldest son *vita patris* a new peerage was created. The petitioner in the case, Elizabeth Perry, claimed to be entitled to the Barony of Sydney of Penshurst, in Kent, as being a barony created by writ of summons addressed, in 1 Will. & Mary, to Robert Sydney, the writ being directed to him as "Roberto Sydney de Penshurst, Chevalier," and he having sat in Parliament thereon. The Attorney-General reported, in effect, that the writ and sitting in that case had not created a barony by writ, the writ having been issued to Robert Sydney for the purpose of summoning him, by way of acceleration, in respect of his father's Barony of Sydney of Penshurst, created by patent in 1603, and limited to his father and the heirs male of his body. For the claimant it was strenuously contended that this doctrine of acceleration was a novel one, and unsupported by authority. It was admitted that it had been customary, when the son was called by the name of one of his father's titles in the lifetime of his father, that he should be given the precedence of his father's barony, but the claimant urged that this was merely by courtesy. The House of Lords, however, decided that the view of the Attorney-General was correct; that the summons to the son did not create a new peerage; and that the claimant, not being heir male of the body of the original grantee of the peerage, had no right under the limitations of the father's barony.

What to be
observed as to
the address of
the writ.

But in order that a writ of summons, issued to an eldest son in the lifetime of his father, may vest in him his father's barony by way of acceleration, the summons must be addressed to him by the name of that barony; otherwise the writ and sitting will create a new barony.

Thus, in the case of Charles Pawlet, son and heir apparent of Charles, second Duke of Bolton, the writ was addressed to him as "Carolo Pawlet de Basing," whereas the name of his father's barony was St. John de Basing, and it was considered that the summons and sitting created a new peerage; for it appears from the Lords' Journals (Vol. 20, p. 446) that, on being introduced into the House and the writ being read, the new peer was placed on the lower end of the barons' bench. This was in 1717.

On the other hand, in 1833, the Duke of Bedford being entitled to the Barony of Howland of Streatham, his son, Francis Russell, was summoned as "Francis Russell of Streatham," but in this case it seems that the Speaker informed the House that the said Francis was summoned to sit in the Barony of Howland, as also appeared from the warrant directing the issue of the writ, and he accordingly sat by that title.

For the usage to apply, the barony in respect of which the son is summoned must, at the time of the summons, be vested in the parent. Thus, where the eldest son of the Earl of Derby was summoned, in the lifetime of his father, in the Barony of Strange, then supposed to be vested in the father, but not in fact vested in him, it was held that the summons and sitting to the son created a new barony. (See Collins' Claims.) And so, where the son and heir apparent of the Earl of Burlington was summoned to Parliament in respect of the Barony of Clifford, it being supposed, but erroneously, that the ancient Barony of Clifford, created 28 Edw. I., was, at the date of the summons, vested in the father, it was considered that the son had acquired a new Barony of Clifford.

Barony must
be vested in
parent.
*Strange and
Clifford Cases.*

In the *Montacute Peerage Case*, 1874 (L. R. 7 H. L. 305), a question arose as to the position of a barony where the son had been called by writ in respect of his mother's barony. The question was whether, if the mother was afterwards attainted of treason, the barony in the son would be affected; and although it was not necessary for a decision of the case, the Lords were of opinion that the barony might be lost by the attainder. "I think," said Lord Cairns, L. C., "it quite sufficient to say that there appears to me to be no principle upon which your Lordships could hold that the circumstances of the son being called to Parliament, and sitting in Parliament by writ of summons, in virtue of a barony of his father or his mother, if his father or mother should be attainted for treason, would save from the consequences of that attainder the barony in respect of which he had been called to sit in Parliament by writ. I think the learned counsel for the petitioner have not in any way established the proposition that if it be supposed that Henry Pole was sitting in Parliament, called by writ in respect

*Montacute
Case.*

of his mother's barony, that would have saved that barony from the consequence of the attainder of the mother, and would leave it as a barony, to go, as it were, by a sort of fresh descent from Henry Pole, the son, who was sitting in Parliament in respect of the barony." Some of the other Lords concurred in this view. But it does not appear that the case of the Clifford Barony (*supra*, p. 130) was cited, and this circumstance derogates from the value of the dicta. For if, as that case goes to show, the summons to the son accelerates the descent of the peerage to him, then it would seem that the subsequent attainder of his mother or father ought not to prejudice the inheritance which has become vested in the son.

CHAPTER IX.

CURTESY AND JURE UXORIS.

CURTESY is thus defined by Littleton *:—"Tenant by the curtesy of England is where a man taketh a wife seised in fee simple or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies the husband shall hold the land during his life by the law of England, and he is called tenant by the curtesy of England, because this is used in no other realm, but in England only." *Curtesy and jure uxoris.*

By analogy to this principle, the husband of a peeress in her own right seems in former times to have been considered entitled, at any rate after issue had, to be summoned to Parliament in respect of his wife's dignity.

Sometimes the husband is summoned as of course to the House of Lords *jure uxoris*; in other cases he seems to have been granted a new peerage.

Two cases may be mentioned here in which the curtesy principle was recognized.

Thus in 20 Hen. VI., Richard Neville, who had married Alicia, daughter and heir of Thomas, late Earl of Salisbury, whose earldom was in fee simple, had the title conferred to him by patent.

The patent recites the letters patent of 11 Edw. III. granting the Earldom of Salisbury to William de Montacute "*sibi et heredibus suis*," the subsequent attainder of his son John for high treason, and the confirmation thereof in Parliament, and the ultimate restoration by Parliament in name and in blood. The patent further recites that Richard, now Earl of Salisbury, had married Alesia, daughter and heir of the aforesaid Thomas, late earl, that she was still living, and that by virtue of the aforesaid letters patent Richard, now earl, the name, status, and honour of the Earl of Salisbury, from the time of the death of the said Thomas, in our presence as well in Parliaments and Councils, has supported and maintained, and to the present time supports and maintains, and for the term of his life by virtue of the *The Salisbury Curtesy Case.*

* Coke on Littleton, 29 a.

premises is entitled to support and maintain, just as William, late earl, would have been entitled if living. The patent follows up these recitals by stating that the King accepted the same Richard for the term of his life, and declared and accepted him accordingly, and the patent proceeded to give him an annuity to support the name and status of Earl of Salisbury, and to the said Alesia to have and to hold to the said earl and Alesia, and to the heirs of Alesia, and further confirmed to the said Richard, Earl of Salisbury, and his heirs who should be heirs of the aforesaid Alesia, the name and dignity of Earl of Salisbury, as fully as William, if living, would have held the same. (See Appendix, p. 276.)

*The Warwick
Curtesy Case.*

In the *Warwick Case*, again, there is an obvious reference to curtesy. The patent was granted in 28 Hen. VI. (See Rot. Parl.; also Redesdale Committee, Vol. 5, p. 273.) It recites certain prior letters patent which had been surrendered, and goes on to grant to Richard Neville and his wife, and the heirs of her body, the name, title, honour, and dignity of Earl of Warwick, with the same pre-eminence as Henry, Duke of Warwick, had before he was created duke, although Richard and Anne had then no issue; and also declares that Richard shall be Earl of Warwick during his life, and Anne, Countess of Warwick, and the heirs of her body Earls of Warwick, with remainder, in default of issue of Anne, to Margaret, Countess of Shrewsbury, and the heirs male of her body, with remainder to the heirs general of her body, with remainder to the right heir of Richard, then late Earl of Warwick. The Anne herein referred to was the daughter of Richard Beauchamp, Earl of Warwick, and cousin and heir of Anne, only daughter and heir of Henry, Duke of Warwick, and the patent is material because the grant is made "*licet iidem Ricus et Anna exitum inter se ad presens non habeant*," thus seeming to indicate that in the ordinary course Richard would not have the title until issue born.

*Argument in
Norfolk Case
against
curtesy.*

In the recent *Earldom of Norfolk Case*, 1907 (A. C. 10), it was argued that there was no such thing known to the law as the husband of a peeress being summoned *jure uxoris*, whereupon the following discussion took place:—

Lord Davey: That was very common in ancient times—that the husband of a female heir sat in this House in right of his wife.

Counsel: I think in most of the cases your Lordship will find a grant made to him.

Lord Davey: I do not think so.

Lord Halsbury: You say that it was rather the practice to do the thing by giving an express grant than that it followed as a matter of law.

Counsel: Yes; I will deal with that.

Lord Davey : It may be so ; of course, he could not sit unless a writ were issued to him.

Counsel : No.

Lord Davey : And the issue of a writ to the husband of a female heir did not create a new peerage, but gave him the enjoyment of his wife's peerage. I think probably that is the solution of it.

Lord Halsbury : I think that is what seems to be the law.

An interesting case occurred in the reign of Henry VIII. Mr. Wymbish had married Elizabeth, Baroness Talboys, the holder of the barony—which had been created by writ in 1529—and claimed the dignity *jure uxoris*. The King consulted the two Chief Justices and others. The Chief Justices confessed the custom concerning the tenant by curtesy to be consonant to the common law, for the common law admitted him to his wife's inheritance of which she was seised during the coverture, and that might descend to their issue, and the title is a preservation of the inheritance, which Dr. Gardiner confessed ; and the law granting the more—which is the possession of the barony—cannot be intended to deny the less, which is the dignity, the thing incident to it. “As it standeth with the law,” said the King, “the tenant by curtesy should have the dignity, so it standeth with reason ; but I like not that a man shall be this day a lord and tomorrow not, without crime committed, and it must so fall out with the husband of a baroness if she die having had no child by him.” The Chief Justice affirmed that in that point the common law dissented not from the King's reason, for the husband that never had issue is thought to have no interest in law in his wife's inheritance more than in respect only that he is a husband ; but having a child he hath acquired a state in law, and is admitted to do homage and not before. . . . The King for resolution said that forasmuch as by their speeches he understood that there was no force of reason nor law to give the name to him that had no issue by his wife, that neither Mr. Wymbish nor any other from henceforth should use the style of his wife's dignity, but such as by the curtesy of England hath also right to her possessions for term of his life : to which opinion the persons aforementioned applauded, and so the King's sentence stood.

*The Talboys
Curtesy Case.*

Fifty years later, however, in 1580, Richard Bertie, who had married Catherine, Duchess of Suffolk and Baroness Willoughby, and had issue by her, claimed the Barony of Willoughby as tenant by the curtesy in right of his wife. The barony had been created by writ in 1313. The claim was referred by Elizabeth to Lord Burghley and to other Commissioners, together with the claim for the same dignity made by Peregrine Bertie, the son of the claimant ; and the Commissioners made their report in favour of the son, who was accordingly

*Willoughby
Curtesy Claim.*

admitted to the dignity in the lifetime of his father. (See Collins' Claims, p. 1.)

*The Dacres
Curtesy Case.*

In 1604 a claim was made by Sir Samson Leonard to the dignity of baron in right of his wife Margaret, Baroness Dacres, who was seised of a barony created by writ in 1321; but the baroness died before any decision, and the affair was compromised in 1612 by the King's granting precedency to the husband to a claimant as eldest son of Lord Dacres. (See Collins' Claims, p. 24.)

Since the above there have not been any claims to dignity by curtesy of England, and it may be taken therefore that, whatever was the older practice, it has now become obsolete. It belonged to a period in our history when the personality of the wife was much more completely merged in that of the husband than in modern times.

CHAPTER X.

RIGHTS, DUTIES AND PRIVILEGES OF PEERAGE.

The Right of Summons to Parliament.

A PEER has, by virtue of his peerage, the right to a summons to Parliament as a temporal peer unless (1) he is disqualified as hereinafter mentioned, or (2) is a peer only as holder of a Scotch or Irish peerage. Right to a summons.

This right to a summons is one to which the peer is entitled *ex debito justitiæ* by the constitutional usage of many centuries, and the right must be treated as having existed at the least from the time that Parliament assumed its present shape in the reign of Edward I.

That King and his immediate successors did not, it is true, always recognize the right, and would seem to have thought that the Crown had a discretion as to which of the peers it should summon. But irregularities like these incident to early and unsettled times cannot impugn or derogate from rights resting on long-continued and indisputable usage, and therefore conclusively evidencing the common law.

Lord Coke recognizes the right very clearly. "Every lord of Parliament," he says (IV. Inst. Chap. 4), "either spiritual, as archbishops and bishops, or temporal, as dukes, marquises, earls, viscounts and barons, peers of the realm and lords of Parliament, ought to have several writs of summons."

And again, "The lords temporal, dukes, marquises, earls, viscounts and barons, who sit by reason of their dignities which they hold by descent or creation, in number at this time 106, and likewise every one of these, being of full age, ought to have a writ of summons *ex debito justitiæ*."

The form of writ used for summoning a peer has from time to time varied slightly. The following is a specimen of a form in use in the fourteenth century:— Form of writ (14th century).

"Henricus Dei gratiâ Rex Angliæ et Franciæ et Dominus Hiberniæ dilecto et fidele nostro N chivaler salutem. Quia avisamento consilii nostri pro quibusdam arduis et urgentibus negociis nos statum et defensionem regni nostri Angliæ ac ecclesiæ Anglicanæ concementibus quoddam parliamentum nostrum apud Westmonasterium die

lunæ, &c., &c. teneri ordinavimus et ibidem vobiscum ac cum ceteris prelati magnatibus et proceribus dicti regni nostri colloquium habere et tractatum vobis in fide et ligeancia quibus nobis tenemini firmes impingendo mandamus quod consideratis dictorum negotiorum arduitate et periculis iminentibus cessante quacunque excusatione dictis die et loco personalitas intersitis nobiscum ac cum ceteris prelati magnatibus et proceribus predictis super dictis negociis tractatum vestrumque consilium impensuri. Et hoc sicut nos et honorem nostrum ac salvacionem et defensionem regni et ecclesiæ predictorum expeditionemque dictorum negotiorum nostrum diligitis nulla tenus omittatis. Teste me ipso apud — xx die Augusti, &c.”

Form of writ
(present).

The form of writ now in use closely follows the old form, and runs as follows:—

Edward the Seventh by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas King Defender of the Faith to our Greeting Whereas by the advice and consent of our Council for certain arduous and urgent affairs concerning us the state and defence of our said United Kingdom and the Church we have ordered a certain Parliament to be holden at our City of Westminster on the day of next ensuing and there to treat and have conference with the prelates, great men and peers of our realm We strictly enjoining command you upon the faith and allegiance by which you are bound to us that the weightiness of the said affairs and imminent perils considered (waiving all excuses) you be at the said day and place personally present with us and with the said prelates great men and peers to treat and give your counsel upon the affairs aforesaid. And this as you regard Us and Our honour and the safety and defence of the said United Kingdom and Church and despatch of the said affairs in no wise do you omit.

Witness ourselves at Westminster the day of in the year of our reign.

To

A writ of summons to Parliament,
the of next.

B remedy for
non-
summons.

Where a peer properly entitled to be summoned to Parliament is not so summoned, his remedy is to petition the Crown. The petition is a petition of right, and if the Crown ignores the claim, the petitioner's remedy is to bring the matter before the House of Lords, the refusal of the writ being an infringement of the privileges of the House.

*The Bristol
Case*
(Charles I.).

The case of the Earl of Bristol, in the time of Charles I., is the leading authority on the point. In that case certain charges had been

made against the Earl, but he was neither put on his trial for the alleged offences nor was he summoned to Parliament. He petitioned the Lords for redress, and the Committee to whom his petition was referred reported that there was no instance on record in which a peer capable of sitting in Parliament had been refused his writ. After some delay the petitioner received a writ of summons recognizing his right.

Writs of summons to Parliament were always under the Great Seal until the passing of the Crown Office Act, 1877 (40 & 41 Vict. c. 41). Since then the writs have been sealed with a wafer Great Seal, in accordance with sect. 4 of the Act. These impressions are made under the direction of the Privy Council, with the same device as the Great Seal "... to be taken in the words of the Act in such manner and of such size or sizes as they may from time to time prescribe, on embossed paper, wax wafer, or other material, and any such impressions ... shall be in the same custody as the seals of which they are impressions, and when attached to, or embossed on, any document required to be or usually authenticated by or under the Great Seal ... shall confer on that document the same validity in all respects as if the document itself had been authenticated by, or passed under, the Great Seal ..."

Sealing of writs.

Writs to Irish representative peers are sealed with the Great Seal in use in Ireland. Scotch representative peers do not receive individual writs of summons, their election being made pursuant to a separate proclamation. The result of the election is certified by the Lord Clerk Register of Scotland to the Clerk of the Crown in Chancery, and by him to the House of Lords.

A peer, other than a new peer, in order to establish his right to attend Parliament must present his writ of summons at the Table of the House of Lords. A new peer presents the letters patent creating his peerage to the Lord Chancellor at the Woolsack, together with the writ of summons issued pursuant thereto.

Peer presenting writ or patent.

A peer has also to take the oath of allegiance and supremacy in accordance with 30 Car. II. c. 1, but he is permitted to affirm under the Parliament Oaths Act, 1866 (29 Vict. c. 19), and the Oaths Act, 1888 (51 & 52 Vict. c. 46). The oath is to be solemnly and publicly made, and subscribed by every member of the House of Peers, at the Table in the middle of the said House, before he takes his place in the said House, and whilst a full House of Peers is there, with their Speaker in his place. (Sect. 3 of the Act.) By sect. 4 Quakers were allowed to affirm, and by sect. 5, "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House without having made and subscribed the oath hereby appointed, he shall, for every such offence,

Oath of allegiance.

be subject to a penalty of 500*l.*, to be recovered by action in one of her Majesty's superior Courts at Westminster." Peers have sometimes inadvertently incurred this penalty. In such a case, they have sometimes been relieved by special Act of Indemnity.

By the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), the oath of allegiance runs as follows:—

"I, _____, do swear that I will be faithful and bear true allegiance to his Majesty King Edward VII., his heirs and successors, according to law, so help me God."

A peer is entitled to privilege even though he has not qualified himself to sit by taking the oaths. (See the decision of the Lords, "*Lords' Journal*," 24th February, 1691, and 13th May, 1720.)

Earls: their sitting.

Does an earl sit as an earl or as a baron? This question has sometimes been debated, and the Lords' Committee appear to take the view that in early days earls sat in respect of their baronies. Thus, in their third Report (see p. 20), the Committee say, "Whether the earls were summoned to the Common Council of the realm as earls or (as the ecclesiastical dignitaries were) by reason of their possessing lands denominated baronies, and, therefore, barons, the Committee cannot venture to assert, though there may be strong ground for supposing that they were properly members of the Common Council of the realm rather as barons than as earls."

Then in their third Report (at p. 150), referring to a charter of the time of Henry I., the Committee say, "It seems, therefore, not improbable that the name of earl was then merely a name of dignity, and that those who were styled earls were not members of the Common Council of the kingdom as earls but as barons."

On the other hand, the cases following require consideration:—

1. In 16 Rich. II. Aubrey de Vere was, by charter made with the assent of Parliament, restored to the Earldom of Oxford, to him and his heirs male for ever, and was immediately summoned to, and sat in, Parliament as Earl of Oxford, although he had no barony in him.

2. In 20 Rich. II. John de Beaufort, the legitimated son of John of Gaunt, Duke of Lancaster, was granted the Earldom of Somerset, and took his seat at once, though he had no barony. With reference to this the Redesdale Committee say, "Upon this transaction it may be observed that John de Beaufort had not been summoned to Parliament by writ previous to his introduction stated in the Roll, nor was any writ issued to him for the purpose of his introduction. He was probably brought into the Parliament by a verbal message from the King, and the King's pleasure was then declared by the Chancellor in the King's name, and by production of the patent under the Great Seal, unless the seal was at the time affixed to the instrument in the King's

presence in Parliament. John de Beaufort does not appear to have been before a baron; he probably had no territorial barony, and as he was not ever summoned to Parliament as a baron he was not, after his creation and taking his seat in Parliament, a baron of the realm, though a peer of the realm, except as an earl might be deemed a baron."

3. In 1 Hen. IV., when Michael de la Pole, son and heir of the attainted Earl of Suffolk, was restored to the earldom and took his seat, but was not restored to his father's barony. (See Redesdale Committee's fourth Report, p. 276.)

4. In 13 Hen. IV. the King's brother was created Earl of Dorset, but the patent contained no grant of a barony. (See Redesdale Committee's third Report, p. 196.)

5. In 2 Hen. V. Henry Percy was restored, with the authority of Parliament, to the Earldom of Northumberland under attainder, but there was no restoration to the barony of his ancestors. (See Redesdale Committee's third Report, p. 278.)

6. In 9 Edw. IV. George Neville was created Duke of Bedford in tail male, without any other dignity being granted to him, and he sat in Parliament accordingly.

7. In 1762 William Courtenay was created Viscount Courtenay without any barony being conferred on him. He sat in Parliament accordingly.

These cases, cited from various reigns, go far to negative the view of the Redesdale Committee that an earl sat not in respect of his earldom but in respect of his barony, showing, as they do, that an earldom conferred on the holder the right to a summons, that is, to a summons as an earl, and, therefore, as a peer, and this is in accordance with the view generally held. (See Comyns' Digest, Dignity, c. 4, where the learned author says that "if a patent under the Great Seal of England creates one an earl, he shall be a peer of England.")

Lastly, Lord Redesdale himself, in the *Berkeley Case*, 1861 (8 H. L. C. p. 144), said: "And the grant of an earldom conferred a seat in Parliament, and precedence from the date of the instrument conferring the earldom, without any regard to the writ of summons or sitting, has always been allowed for the House."

The Duty of a Peer to Attend on the Summons.

The right of a peer to a writ of summons involves, and has from time immemorial involved, a correlative on his part to attend in accordance with the summons. A recognition of this duty may be found in the Patent Rolls (21 Edw. III.), where Hugh, Earl of Devon, at the request of his eldest son, and of William, Earl of Northampton, is

Duty to
attend on
summons.

exempted from future attendance in Parliament on account of his infirmities, provided he always sent his proxy.

In 27 Edw. III. letters patent under the Great Seal are granted to James de Audeley, that for his whole life he shall be quit of going to our Parliaments and Councils, and to those of our heirs.

And again, Robert de Insula is excused from attending in Parliament by patent (42 Edw. III.). There are numerous other instances. (See them set out in Nicolas's Report of *De Lisle Case*, p. 65.)

The duty to attend the Sovereign and Council was recognized and affirmed by a Statute of 5 Rich. II. c. 4, which may be regarded as declaratory of the common law. It provides as follows:—

Statute
5 Rich. II.
c. 4.

Item, the King doth will and command, and it is assented in the Parliament by the prelates, Lords and Commons, that all and singular persons and commonalties which from henceforth shall have the summons of the Parliament, shall come from henceforth to the Parliaments in the manner as they are bound to do, and [have] been accustomed within the realm of England of old times. And if any person of the same realm which from henceforth shall have the said summons, be he archbishop, bishop, abbot, prior, duke, earl, baron, banneret, knight of the shire, citizen of city, burgess of borough, or other singular person or commonalty, do absent himself and come not at the said summons, except he may reasonably and honestly excuse him to our Lord the King, he shall be amerced, and otherwise punished, according as of old times hath been used to be done within the said realm in the said case. And if any sheriff of the realm be from henceforth negligent in making his returns of writs of the Parliament, or that he leave out of the said returns any cities or boroughs which be bound, and of old time were wont to come to the Parliament, he shall be [amerced or otherwise] punished in the manner as was accustomed to be done in the said case in times past.

This statute recognizes and affirms in the plainest terms the obligatory character of the ancient usage of the Lords to go to Parliament when summoned, and it enacts in effect that they shall from thenceforth attend in accordance with such usage.

Coke says: "If a lord depart from Parliament without license, it is an offence done out of Parliament, and is finable by the Lords." (Inst. 4, p. 43.)

Disqualifica-
tions for right
to writ.

A peer's right to a writ is subject to certain

Disqualifications.

Infancy.

1. **Infancy.**—The first of these is infancy. By the Standing Orders of 22nd May, 1685, no lord under the age of one-and-twenty years shall be permitted to sit in the House. Apart from this order there

is nothing that would seem to prevent a peer under the age of twenty-one years from sitting; that is to say, an English or Irish peer. Scotch representative peers must be of full age. (See Hatsell's Precedents, Vol. II. p. 11.)

2. **Felony.**—Under 33 & 34 Vict. c. 23, abolishing forfeiture for Felony. treason or felony, it is provided that “if any person hereafter convicted of treason or felony for which he shall be sentenced to death or penal servitude for any term of imprisonment with hard labour or exceeding twelve months, he is to become (and until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from [His] Majesty), shall continue thenceforth incapable . . . of sitting or voting as a member of either House of Parliament.”

3. **Bankruptcy.**—By sect. 32 of the Bankruptcy Act, 1883, it is provided that where a debtor is adjudged bankrupt he shall, subject to the provisions of the Act, be disqualified for sitting or voting in the House of Lords or in any Committee thereof, or being elected as a peer of Scotland, or of Ireland, to sit and vote in the House of Lords, but that the disqualification is to be removed and cease if and when the adjudication of bankruptcy against him is annulled, or he obtains from the Court his discharge, with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part; and under sect. 5 of the Bankruptcy Act, 1890, the disqualification only continues for five years from date of discharge. By sects. 6 & 7 of 34 & 35 Vict. c. 50, any person disqualified from sitting and voting in the House of Lords who sits and votes, or attempts to sit or vote in that House, or in any Committee thereof, is to be guilty of a breach of privilege, and to be dealt with as the House of Lords may direct; and by sect. 7 of the same Act provision is made for giving notice to the Speaker of the House of Lords of the bankruptcy of a peer. Privilege of Parliament will not now prevent a peer, if he commits an act of bankruptcy, from being dealt with in like manner as if he had not such privilege. (Bankruptcy Act, 1883, s. 124.)

A peer's amenability to bankruptcy will not, however, affect his immunity from arrest for debt.

The possession of a peerage is a disqualification for a seat in the House of Commons, unless the peerage be an Irish one. Sitting in Commons.

A peer of Parliament is incapacitated from voting at an election for members of the House of Commons, and is, therefore, not entitled to a place on the register of voters, and his name, if there, ought to be struck off on its being proved that he is a peer of Parliament. (*Earl Beauchamp v. Madresfield*, 1872, L. R. 8 C. P. 245.) Voting at election for Commons.

Privileges.

Freedom
from arrest.

Privileges of a Peer.

1. **Freedom from Arrest.**—From time immemorial a peer has been privileged from arrest, but this immunity is only in respect of civil proceedings, and does not extend to treason, felony, or breach of the peace, or refusing to give security for the peace. Numerous instances of the assertion and recognition of this privilege are given in Hatsell, Vol. I., and in May, c. 5, and the Act 1 Jac. I. c. 13, recognises the privilege. One of the most instructive cases is the following:—On 14th March, 1625, Charles I. had committed the Earl of Arundel to the Tower, but the cause of his commitment was not expressed. It was supposed to be on account of the marriage of his eldest son with the sister of the Duke of Lennox, a relation to the King. The Lords, strongly discontented that he was committed sitting the Parliament, resolved to take the matter into consideration, and so to proceed as to give no just offence to his Majesty and yet preserve the privilege of Parliament. Upon this, the Lord Keeper acquainted the House that he was commanded by his Majesty to deliver this message to their Lordships, namely, that the Earl of Arundel was restrained for a misdemeanour which was personal to his Majesty and lay in the proper knowledge of his Majesty, and had no relation to matters of Parliament. The Lords, however, immediately resolved themselves into a committee, and the House being resumed, the Lords' Sub-committees for Privileges were appointed to search for precedents concerning the commitment of a peer of this realm during the time of Parliament, and several of the judges were ordered to attend their Lordships. . . . On the 8th April the Lord President reported the proceedings of the sub-committees. First, that the King's counsel had searched and acquainted the Lords with all that they had found in records, chronicles, or stories touching this matter unto which the Lords' Committees had given a full answer, and also showed such precedents as did maintain their own right. This report being read, it was agreed, upon the question by the whole House, *nemine contradicente*: "That the privilege of this House is that no lord of Parliament sitting in Parliament, or within the usual times of privilege of Parliament, is to be imprisoned or restrained without sentence or order of the House, unless it be for treason or felony, or for refusing to give surety for the peace." And a committee was appointed to consider of a remonstrance of the privileges of the peers of Parliament and of the number of petitions to be made unto his Majesty to enjoy the same. After some delays and evasive answers the Lords resolved: "That all other business shall cease, and that consideration be had how their privileges may be preserved to posterity." Eventually, however, the King gave in, and upon Thursday, the 8th June, the

Lord Keeper delivered this message from his Majesty: "That, in pursuance of his message of the Saturday last to take away all dispute, and that the privileges of the Lords may be in the same estate as they were when this Parliament began, his Majesty hath taken off his restraint of the Earl of Arundel whereby he hath liberty to come to the House." And the Earl of Arundel, being present, did render his most humble thanks to his Majesty for this his gracious favour to him, and gave their Lordships also most hearty thanks for their often intercession to the King, and protested his loyalty and faithful service unto his Majesty.

A person succeeding to a peerage whilst under arrest has been held to be entitled to his discharge by virtue of his privilege. Thus, where in 1849 Lord Harley succeeded on the death of his father to the Earldom of Oxford, being then in custody in the Queen's prison, it was contended that he was not entitled to privilege until he had taken his seat as a peer; but this contention was overruled, and his lordship was discharged. (*McCabe v. Lord Harley*, May, 143.)

The privilege formerly extended to the servants of a peer during session, and twenty days before and after. (May, 106 and 108; Anson, 226.)

The value of the immunity from arrest has, however, been greatly diminished by the abolition of arrest on mesne process (1 & 2 Vict. c. 110, s. 1), and by the Debtors Act, 1869, whereby, with certain exceptions, it is enacted that no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money. The cases excepted from the operation of the enactment are specified in sect. 4 of the Act, and include default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract; default in payment of any sum recoverable summarily before a justice or justices of the peace; default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control; and various other defaults. Power is also reserved to the Court by the Act (sect. 5) to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that, or any other competent Court, subject, however, to the qualifications therein set forth. In all these exceptional cases, however, the peer's immunity from arrest is still available to protect him, and the remedy against him is not arrest but sequestration, under Ord. XLIII. r. 6, of the Supreme Court Rules.

Numerous cases, in which the privilege of both Houses of being

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free from arrest has been asserted and admitted, are set forth in Hatsell's *Precedents*, Vol. I., and in *Elsynge*.

Trial by
peers.

2. **Trial by Peers.**—Another privilege of peerage is that a peer has a right when indicted of high treason, or felony, or of misprision of either, to be tried by his peers.

This ancient right or privilege may, according to Finch, L. C., be traced to a period antecedent even to the Conquest. "They," said the Lord Chancellor in his address as High Steward in the trial of Lord Morley, 1678 (7 *State Trials*, 145), "look but a little way that find this in the steps of the Norman Conquest, for it is to be found even in the footsteps of the Saxon Monarchy, when Godwin, Earl of Kent, was tried by earls and barons."

Be this as it may, it is certain that the wording of the Great Charter has been uniformly treated as recognizing and affirming the right of a peer to be tried by his peers.

Thus in 1 Edw. III. Henry of Lancaster, brother and heir of Thomas, Earl of Lancaster (beheaded and attainted in 1322), petitioned Parliament for a reversal of the judgment as erroneous, and amongst other things:—

"*Dicit etiam quod erratum est in hoc, quod cum predictus Thomas comes fuisset unus parium et magnatum regni, et in Magna Carta de libertatibus Angliæ contineatur quod 'nullus liber homo capiatur imprisonetur aut disseisiatur de libero tenemento suo vel libertatibus seu liberis consuetudinibus suis, aut utlagetur aut exuletur, nec aliquo modo distruatur nec dominus Rex super ipsum ibit, nec super eum mittet, nisi per legale iudicium parium suorum, vel per legem terræ'* predictus Thomas comes per recordum regis ut predictum est, tempore pacis erronee morti fuit adjudicatus, absque arenamento seu responsione, seu legali iudicio parium suorum, contra legem terræ et contra tenorem Magnæ Chartæ predictæ." (*Rot. Parl. II. p. 5.*)

And the judgment was annulled by Parliament accordingly.

Again, in 1330 (3 Edw. III.) judgment of high treason and forfeiture was given against Roger Mortimer, Earl of March, upon articles or accusation charged at the suit of the King, and as appears from *Rot. Parl. Vol. II. p. 53*, this judgment was given by the earls, barons, and peers of the realm as judges of Parliament.

Conversely, when in the same Parliament the peers were called on to try Simon de Beresford for treason they refused, saying that the said Simon was not their peer and, therefore, that they were not bound to judge him as a peer of the land.

Another historical instance in point is that of Richard, son and heir of that Edmund, Earl of Arundel, who was condemned and beheaded without legal trial in 18 Edw. II. This Richard petitioned (5 Edw. III.) that

he might be restored to his rights and heritage, considering that the said earl was put to death by violation of the Great Charter, which enacted "nul conte baron ne nul autre du roialme soit jugge mais per proces de ses pieres," and relief was granted him by Parliament on this ground. (See Rot. Claus. (5 Edw. III.), and Redesdale Committee's Reports, Vol. V. p. 24.) And this was followed by an Act of Parliament (28 Edw. III. Rot. Parl. II. p. 256), reversing, on the same ground, the Act of 1 Edw. III., by which the deceased earl's estate had been forfeited.

As a sidelight on the subject the following enactment extracted from the Rolls of Parliament (15 Edw. III.), Vol. II. p. 132, may be cited:—

"Item pur ce q̄ avant ces heurs piers de la terre ount este arestuz et emprisonnez et lour terres et tenements biens et chateux seisis en mayns des rois et ascuns mys a la mort sans jugglement de leur piers accordez est et assentuz que nul pier de la terre officer ou autre por cause de son ofice ne des choses touchantes son office ne per autre cause soit mesnes en jugglement a perde de leur terres tenēmts biens ne chalelx n'estre arestuz n'emprisonnez autlagez exulez ne forsjuggez ne respondre n'estre juggez sinoun per agard des ditz piers en Parliament," &c.

Finally, in 1442, the privilege, as guaranteed by the Great Charter, received parliamentary recognition in the Act 20 Hen. VI. c. 9, which runs as follows:—

"Item Whereas it is contained in the Great Charter amongst other things in the form which followeth: No freeman earl be taken or imprisoned or deseised of his freeholds his liberties affairs customs or shall be outlawed or banished or in any way destroyed nor will we go upon him or send upon him but by the judgment of his peers or by the law of the land. In which statute no mention is made how women, ladies of great estate, married or sole, shall be put to answer," and accordingly the statute proceeds to enact that they are to be "brought to answer, and put to answer, and judged before such judges and peers as the peers of the realm should be if they were indicted or impeached of such treason or felony in like manner and form and not otherwise."

If Parliament is sitting the accused peer has a right to be tried in the House of Lords; that is, in the Court of our Lord the King in Parliament. If Parliament is not sitting, then he has a right to be tried in the Court of the Lord High Steward.* There is a considerable difference in substance between these two tribunals, although they have certain features in common.

The office of Lord High Steward used to be hereditary, but this has

* For centuries the Court of the Lord High Steward has been a recognized part of the Constitution, see IV. Inst. 58, Blackstone IV. 258; but doubts as to the regularity of its origin have of late been expressed. See note at conclusion of Appendix.

not been so for centuries. The settled practice is, when the necessity arises, for the Crown to issue a commission, appointing a peer to be Lord High Steward *pro hac vice* for the time. (Blackstone, IV. 258.)

The Court of
the King in
Parliament.

Even where a peer is to be tried before the King in Parliament, it is usual for the House to apply to the Crown to appoint a Lord High Steward for the occasion to preside at the trial; but his powers in such a case are very different to those of the Lord High Steward presiding in the Court of the Lord High Steward.

The Court of
the Lord High
Steward.

In the latter case the Lord High Steward sits alone as judge, and rules all points of law and practice. The other peers who take part in the trial are merely judges of fact. In the case of trial of a peer in the Court of our Lord the King in Parliament the position is different. All the peers present sit as judges; the Lord High Steward merely occupies the position of president or Speaker. Each peer votes upon every question, whether of law or of fact; and, in case of a difference of opinion, the matter is decided by a majority of votes, the Lord High Steward having only one vote as a peer and member of the Court.

Whichever may be the tribunal before which the trial takes place—the King in Parliament or Court of the Lord High Steward—the judges of the ordinary Courts of law are summoned to attend and advise on points of law.

These distinctions between the two tribunals, which have not always been duly appreciated, will be found fully discussed and judicially recognized in the case of Earl Ferrers, tried for murder 17th April, 1760, where the opinion of the judges was taken and was delivered by the Lord Chief Baron, Sir Thomas Parker, with weighty reasons and explanations. These are set out at length in Foster's Crown Cases, p. 139 *et seq.*

Various instances of the trial of peers in full Parliament and in the Court of the Lord High Steward may be found in Howell's State Trials; but it may be sufficient here to refer to the trial in full Parliament in 1746 for treason of the Earl of Kilmarnock, the Earl of Cromarty, and Lord Balmerino (18 State Trials, 441), a case which is the more instructive because the report sets out the commission in that case granted to the Lord Chancellor Hardwick as Lord High Steward "for this time," and because the trial took place after the statute of 7 Will. III. below mentioned; the trial of Earl Ferrers in full Parliament in 1760 for murder (19 State Trials, 886); and the trial in full Parliament in 1901 for bigamy of Earl Russell (1901, A. C. 446).

The following are instances of trials in the Court of the Lord High Steward:—

The trial of Lord Morley, in 1666, for treason (6 State Trials, 777),

in which case the Lord High Steward's commission is set out *verbatim*. The trial, in 1678, in the Court of the Lord High Steward, of Lord Cornwallis, for murder. (7 State Trials, 145.) The trial of Lord Delamere, in 1686, for high treason. (11 State Trials, 510.)

As to origin of Court of Lord High Steward, see note at conclusion of Appendix.

And the following further cases of trial in full Parliament are of interest:—The trial of Viscount Stafford for treason in 1680. (7 State Trials, 1294.) The trial of Earl Danby for treason in 1685. (11 State Trials, 599.)

By 7 Will. III. c. 3, s. 11, after reciting that upon trials of peers 7 Will. III. or peeresses a major vote is sufficient either to acquit or condemn, it ^{c. 3.} was enacted that upon the trial of any peer or peeress, either for treason or misprision, all the peers who have a right to sit and vote in Parliament shall be duly summoned, twenty days at least before every such trial, to appear at every such trial, and that every peer so summoned and appearing at such trial shall vote in the trial of such peer or peeress so to be tried, every such peer first taking the oaths, &c. But the Act provided that neither this Act nor anything therein contained shall anywise extend to, or be construed to extend to, any impeachment or other proceedings in Parliament, in any kind whatsoever, and that this Act, nor anything therein contained, shall anyways extend to any indictment of high treason, nor to any proceedings thereupon for counterfeiting his Majesty's coin, his Great Seal or Privy Seal, his Sign Manual or Privy Signet. It is well settled that this Act, notwithstanding the proviso, applies not only to the Lord High Steward's Court, but also to a trial before the King in Parliament. This was so decided in the case of the Earl of Kilmarnock and others, 1746 (18 State Trials, 442).

The benefit of this Act, which deals only with treason, was extended to offences declared to be treason by another Act, passed in the reign of Queen Anne (2 & 3 Anne, c. 20, s. 43), and which included correspondence, or treating with the Queen's enemies or rebels, &c. By 6 Anne, c. 23, s. 12, provision was made for the indictment of peers of Great Britain who had committed high treason and other felonies in Scotland.

Coke's Inst. that a nobleman cannot waive his trial by his peers (3 Inst. 29). This is in accordance with the answer of the judges in *Lord Dacre's Case* (26 Hen. VIII.) on a question whether he might waive his trial by his peers; the judges agreed that he could not, for the statute of Magna Charta is in the negative, "*Nec super eum ibimus nisi per legale iudicium parium suorum.*" (Kelyng's Rep. p. 56.)

Freedom of
speech.

3. Freedom of Speech in Parliament.—This is an ancient and well-recognized privilege of the peers.

Immunity
from civil
actions.

4. Immunity from Civil Actions.—One of the privileges formerly attaching to peerage was that of not being impleaded in any civil action or proceeding; but this privilege has been modified by a series of statutes. The first of these (12 & 13 Will. III. c. 3) enacted that any person might commence and prosecute actions against any peer, or member of Parliament, or their servants, or others entitled to privilege in the Courts at Westminster and the Duchy Court of Lancaster immediately after a dissolution or prorogation, until the next meeting of Parliament, and during any adjournment for more than fourteen days, and that during such times the Court might give judgment and award execution, and the privilege was limited in other respects by the same statute. By a later statute (2 & 3 Anne, c. 18) it was enacted that no action, suit, process, proceeding, judgment or execution against privileged persons employed in the Revenue or any office of public trust, or any forfeiture, penalty, &c., should be stayed or delayed by or under colour or pretence of privilege of Parliament.

The Act of 12 & 13 Will. III. c. 3, had extended only to the principal Courts of law and equity; but by 11 Geo. II. c. 24, all actions under it in relation to real and personal property were allowed to be commenced and prosecuted in the recess, and during adjournments of more than fourteen days, in any Court of Record.

Finally, by 10 Geo. III. c. 50, it was enacted "that any person may at any time commence and prosecute any action or suit in any Court of Record or Court of Equity or of Admiralty in all cases matrimonial and testamentary, against any peer or lord of Parliament of Great Britain . . . or against any of their menial or other servants, or any other person entitled to the privilege of Parliament; and no such action, suit, or other process or proceeding thereupon shall at any time be impeached, stayed, or delayed by or under any colour or pretence of any privilege of Parliament." (See also 45 Geo. III. c. 124, and 47 Geo. III. Session 2, c. 40. See Bankruptcy Act, 1883, s. 124: "If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with in like manner as if he had not such privilege.") This follows the policy of the Bankruptcy Acts, 1861 and 1869, under both of which a peer was liable to be made a bankrupt.

Exemption
from summons
as witness.

5. Exemption from Summons as Witness.—Another privilege of a peer was at one time that of not being served with a subpoena to give evidence (1 Hatsell, 169, 175; May, Parl. Pr. 114). And it is still the rule that one House of Parliament will not permit its members to be summoned by the other without a message desiring his attendance,

or without the consent of the member whose attendance is required. (May, Parl. Pr. 149.)

6. **Knights on Jury where Peer a Party.**—Another privilege at one time possessed by a peer was that in any action to which he was a party he had the right to have knights upon the jury; but this right was in effect abrogated by 24 Geo. II. c. 18, s. 4. Rights to have knights on jury.

7. **Proxies.**—Another privilege is, or was, that a peer may by license obtained from the King make another lord of Parliament his proxy to vote for him in his absence. (Blackstone, Vol. I. p. 162.) This is a most ancient privilege, as appears *supra*, p. 142. But some forty years ago (1868) it was by consent abandoned, the House, according to a Standing Order, resolving that the practice of calling for proxies on a division should be discontinued. Proxies.

8. **Protest.**—Blackstone says that each peer has also a right, by leave of the House, when a resolution passes contrary to his sentiments, to enter his dissent on the Journals of the House, with the reasons of such dissent, which is usually styled his "protest" (Vol. I. p. 162). Protest against resolution.

9. **Exemption from Jury Service.**—A very ancient privilege of the peerage is not to be liable to serve on juries. (See Coke on Littleton, 156 b; and Lords' Committees' Report, Vol. I. p. 396.) This exemption has now been made matter of statutory right (33 & 34 Vict. c. 77). Exemption from jury service.

10. **Access to Sovereign.**—Another privilege of a peer is that of personal access to the Sovereign. (See Anson, 227; Stubbs' Constitutional History, 515.) Access to sovereign.

11. **Scandalum Magnatum.**—By 2 Rich. II. special provision was made for the punishment of those who made false statements concerning prelates, dukes, earls, barons, and other nobles and magnates. This statute was supplemented by subsequent statutes (12 Rich. II. c. 11; 1 & 2 Philip & Mary, c. 3; 4 & 5 Philip & Mary, c. 9; and 1 Eliz. c. 6); but these enactments have been repealed by the Statute Law Revision Act, 1887 (50 & 51 Vict. c. 59). Scandalum magnatum.

12. **Chaplains.**—A peer or peeress may appoint chaplains subject to the provision of the Statute of Pluralities, which limits the number. Chaplains.

13. **Taking King's Deer.**—An ancient privilege of the lords is that declared by the Charter of the Forest (9 Hen. III. c. 11), that every lord, spiritual or temporal, summoned to Parliament and passing through the King's forests, may both in going and returning kill one or two of the King's deer without warrant in view of the forester, if he be present, or on blowing a horn, if he be absent, that he may not seem to take the King's venison by stealth. (Blackstone, Vol. I. p. 161.) This privilege is not now exercised. Taking King's deer.

Answering 14. **Answering "on honour."**—Before the abolition of the Bill of
 "on honour." answering in Chancery, a peer enjoyed the privilege of answering a
 Bill "on his honour"; but this privilege has disappeared with the
 change in Chancery procedure.

A peer examined as a witness is sworn like a commoner.

Disclaimer of 15. **Disclaimer of new Privileges.**—In 1704 the Lords passed a
 new resolution, which was communicated to the Commons at a conference,
 privileges. declaring that neither House of Parliament has power by any vote or
 declaration to create to itself new privileges not warranted by the
 known laws and customs of Parliament.

And to this resolution the Commons assented. (14 Commons Journals, 555.)

Peeresses' Privileges.

Peeresses' Peeresses, whether they be peeresses by birth, by creation, or by
 privileges. marriage, are entitled to the same privileges as peers, but if a peeress
 by marriage should afterwards intermarry with a commoner, she
 forfeits her privileges. (May, Parl. Pr. 110; Coke Lit. 166.) By the
 Lords' Standing Orders, No. 53 (May, Parl. Pr. 110), it is ordered and
 declared by the Lords that privilege of Parliament shall not be
 allowed to minor peers, noble women, or widows of peers, saving their
 right of peerage.

Scotch and Irish Peers.

Scotch and As to their status, rights and privileges, see Chap. XIV., *infra*.
 Irish peers.

Ordinary Lords of Appeal.

Lords of See as to these the Appellate Jurisdiction Acts, 1876 and 1887,
 Appeal. *supra*, p. 88.

The Lords Spiritual.

Lords Twenty-six spiritual lords sit in the House of Lords. Formerly,
 spiritual. the spiritual lords were considered to be peers of the realm, but it is
 now settled that they are not peers, although they are lords of
 Parliament, and therefore that they are not entitled to be tried as
 the peers are. (See Redesdale Committee's first Report, 393; Anson,
 p. 221; May, Parl. Pr. 669, p. 15.)

Rights and Privileges of the House of Lords.

Rights and The above are the personal privileges of peers. Beyond these
 privileges of personal privileges it is not within the scheme of this work to go, or
 the House of Lords.

to enter into the rights and privileges of the House of Lords as representing the peerage collectively. It is enough to say that among these rights and privileges of the House of Lords may be enumerated—

1. Its power under the Constitution in regard to legislation.
2. Its power to hear appeals from the Courts below.
3. Its power to sit as a Court on impeachment of the Commons.
4. Its right to be attended by the judges for their advice on points of law. (Blackstone, Vol. I. p. 162.)
5. Its power to deal with questions relating to Irish peerages, in accordance with 39 & 40 Geo. III. c. 67 (1800).
6. Its power to deal with questions relating to Scotch peerages under 10 & 11 Vict. c. 52.
7. Its right to insist that all Bills that may in their consequences in any way affect the rights of the peerage, shall, in accordance with the custom of Parliament, have their first rise and beginning in the House of Lords, and suffer no changes or amendments in the House of Commons. (Blackstone, Vol. I. p. 162.)
8. Its power to try all peers and peeresses for treason and felony.
9. Its exclusive power to determine its own privileges, to declare what is a breach of privilege, and to commit for contempt parties infringing such privileges.
10. Its power to release by warrant any peer improperly arrested. (May, Parl. Pr. 135—137.)
11. Its power to determine questions of precedence amongst its members.
12. Its power to declare the law in regard to its own constitution.

CHAPTER XI.

SURRENDER AND ALIENATION.

Bygod's
surrender
(30 Edw. I.).

IN early times the idea seems to have prevailed that a peerage could be alienated by surrender. Thus in 30 Edw. I., 12th April, 1302, Roger le Bygod purports by deed to surrender the Earldom of Norfolk to the King. The surrender runs as follows:—

“To all to whom this present writing shall come Roger le Bygod Earl of Norfolk and Marshal of England greeting in the Lord. Know ye that we have surrendered remised and altogether quit claimed for us and our heirs to the magnificent prince and our very dear Lord the Lord Edward, by the grace of God illustrious King of England whatever of right honour and lordship we had by name of Earl in the County of Norfolk and the Marshalcy of England to have and to hold to the same Lord the King and his heirs with all and singular the things thereto howsoever appertaining by whatever name they may be known quit from us and our heirs for ever so that we and our heirs or any one in our name henceforth shall not be able to challenge or have anything of right or claim in the same or their appurtenances whatever. These being witnesses, &c.”

The surrender is witnessed by John de Langton, the Chancellor; by Roger de Brabazon, a justice in the King's Bench; by John de Drohenesford, Keeper of the King's Wardrobe; John le Bygod, brother and next heir of the surrenderor; and by several other judges and distinguished persons. There was nothing in the nature of secrecy about it. Everyone, no doubt, supposed the surrender to be valid, including the King, for on 12th July, 1302—three months after the surrender—he acted thereon, and by charter granted the Earldom and the Marshalcy to the same Roger and the heirs of his body. This charter was witnessed by the Archbishop of Canterbury, the Bishop of Lincoln, the Bishop of Salisbury, the Earl of Surrey, the Earl of Lancaster, the Earl of Lincoln, and other great nobles. Roger died in 1306 without issue, and in 1312 Edward II. granted the Earldom of Norfolk to his brother, Thomas de Brotherton, in tail general. (See the form of this charter in the Appendix, *infra*, p. 249.)

Later cases.

With such a precedent on record, no wonder subsequent generations regarded the surrender of a peerage as valid beyond all question.

Thus in 2 Rich. II. the charter by which Guichard d'Angle had been created, in the previous year, Earl of Huntingdon for life was cancelled, and a grant of 1,000*l.* per annum was substituted. In 9 Rich. II. Robert de Vere was created Marquis of Dublin for life (V. 78), but, as a marginal note on the Roll shows, the charter was cancelled in the following year, when Robert was created Duke of Dublin, and the cancellation is recited in the charter granting the dukedom. (R. C. V. 79.)

There are a number of other examples. Thus, the Earldom of Warwick was in 27 Hen. VI. confirmed by letters patent (V. 272) to Richard Neville and Anne his wife (sister of Henry, late Earl and Duke of Warwick) and her heirs. The following year (28 Hen. VI.) the letters patent were brought into the Chancery and cancelled, and a new patent was granted with different limitations. (R. C. V. 273.)

In 4 Edw. IV. John Nevill, Lord Montague, was granted the Earldom of Northumberland in tail general. (R. C. V. 364.) Four years later, in 8 Edw. IV., the patent was brought by the grantee into Chancery to be cancelled, and he was thereupon created Marquis of Montague. The new charter recites the restitution of the old charter for cancellation. (R. C. V. 278.)

In 8 Edw. IV. (1469) William Herbert was created Earl of Pembroke in tail general. (R. C. V. 274.) Ten years later, in 1479 (18 Edw. IV.), his son William, the second earl, was induced to surrender the title, reserving the status of earl, and received in exchange the title of Earl of Huntingdon. (See the charter, R. C. V. 417. This transaction is discussed in the Redesdale Committee's third Report, p. 219.)

Lewis de Bruges, Lord of Grutbruges, was created Earl of Winchester in 1472 (12 Edw. IV.). In 1500 (15 Hen. VII.) he surrendered the patent with a view to its being cancelled, and it was cancelled accordingly. (See R. C. V. 392.)

In 1513 (5 Hen. VIII.) Sir Charles Brandon was created, by letters patent, Viscount Lisle. In 1514 he was created Duke of Suffolk. In 1523 he surrendered the patent creating him Viscount Lisle.

In 1639 we have a surrender, by fine, of the Barony of Stafford by Roger Stafford. This peerage was a very ancient barony by writ. It was vested in Edward Stafford, Duke of Buckingham, at the time when he was beheaded and attainted in 1522, but was restored in 1547 to his son Henry by Act of Parliament (1 Edw. VI.), with a new limitation in tail male. Roger Stafford, the surrenderor, was, or claimed to be, the heir male of the body of this Henry, and, in deference to the wishes of Charles I., who wanted the title of Baron Stafford for Sir William Howard (married to Mary, the heir general of the Stafford family),

Huntingdon,
1378.

Dublin, 1287.

Warwick,
1450.Montague,
1469.Pembroke,
1479.Winchester,
1500.Viscount
Lisle (Duke
of Suffolk),
1523.Stafford,
1639.

Grey de
Ruthyn,
1640 (resolu-
tion against
validity of
alienation).

surrendered the barony; and, to carry out the arrangement, a fine was levied (15 Car. I.) in the Common Pleas, in which the King was plaintiff and Roger deforceant, and the latter acknowledged that the barony was the right of the King, as what the King had from the surrender of Roger, and which Roger remitted and quit-claimed for him and his heirs to the King, his heirs and successors for ever. (See Redesdale Committee, third Report, 232.) Here we have an unmistakable recognition of the view that a peerage could be validly surrendered. But it was not to remain long unchallenged, for, in the *Grey de Ruthyn Peerage Case*, in 1640, it appears (Collins' Claims, p. 256) that, upon something which was spoken of in the argument concerning a power of conveying away of honour, it was resolved upon the question, *nemine contradicente*, "That no person that hath any honour in him, and a peer of this realm, may alien or transfer the honour to any other person"; and again, in the final decision, we have it, "Resolved upon the question, *nemine contradicente*, that no peer of this realm can grant or extinguish his honour, but that it descends unto his descendants neither by surrender, grant, fine, nor any other conveyance to the King."

Purbeck's Case,
1678 (against
validity).

These conclusions, though in form mere resolutions, must be regarded as a declaration of the law; at any rate, as from the time of Edward I. The view which they sum up received full recognition, after very elaborate argument, in *Viscount Purbeck's Case*, reported in Collins' Claims, 293. It appears from this report that Robert Villers, being desirous of surrendering his title, applied in 1660 to His Majesty in Council and was given liberty to surrender his honours by levying a fine or other conveyance of the same in due form of law, and this was accordingly done. Later on, in 1675, Robert Villers, son of the surrenderor, petitioned for the dignity. The matter was referred to the Attorney-General, and he reported that there was considerable question whether the dignity of a viscount could be surrendered to the King by a fine, and the point was argued at the Bar, in June, 1678, by three counsel for the petitioner and by Sir William Jones, Attorney-General, for the King. On behalf of the petitioner it was urged that a peerage could not be surrendered to the Crown, being a personal dignity annexed to the blood, and inseparable and inalienable.

Lord Shaftes-
bury's speech.

In support of the surrender, on the other hand, the Attorney-General cited the various cases already referred to, in which surrenders of peerages had been made.

"It will be allowed, Mr. Attorney, that the concurrence of all parties concerned may extinguish this as well as other inheritances; but all parties concerned cannot be supposed to concur without an Act of Parliament. The whole kingdom have an interest in the peerage. It is a dangerous doctrine to say your Lordships' judicature and

legislature is only your own concern, and not the interest and concern of the whole nation. . . . It is granted that honours may be forfeited, but it doth not therefore follow that they may be extinguished; there being two reasons for the forfeiture which are peculiar to honour.

"1. Because there is a condition involved that they shall be true and loyal to the Crown and Government.

"2. Honours are inherent in the blood, and when that is corrupted and stained, that which was inherent is likewise taken away.

"But in the case of surrender those reasons do not hold. Here there is no breach of any condition in law; here is no corruption of blood. . . . As to Mr. Attorney's precedents, the first he quoted was Mr. Selden's 'Titles of Honour,' folio 730, which place is directly against him."

His Lordship examined the passage, and continued: "As for all Mr. Attorney's other precedents out of the Close Rolls, and Charter Rolls, and Mr. Camden, being about eleven or twelve surrenders of earldoms and other honours, it is desired your Lordships to consider these three answers to them all together and in gross:—

"1. That they were all bare surrenders and no fines, so that if Mr. Attorney's assertion held that your honours are an estate tail, they cannot be extinguished by surrender; and a greater danger Mr. Attorney would have your Lordships apprehend—of those Lords coming to claim their places, and the confusion that would happen to the House from it doth still remain and continue.

"2. All these surrenders were made by persons that had advantage by *them* having greater honours or the same granted to them with some advantage . . .

"3. Is that Mr. Attorney concluded his argument with—that none ever came and claimed after, so that all his precedents passed *sub silentio* and never contested. If any of these surrenders had upon a dispute been adjudged good, Mr. Attorney had offered your Lordships something.

"But now we come to Mr. Attorney's sole, single, melancholy precedent of the time of Roger Stafford, about 1638, which was condemned in Parliament anno 1640.

"If you condemn that judgment because of the time, or that the King's Counsel was not heard in it, it is to be observed—

"1. The affront to the Lords in asking such a fine was committed in anno 1638, and when could it more properly be remedied than in 1640 following? You must not expect a prophetic judgment against a thing not in being.

"2. There were ninety-four Lords present, and the vote was *nemine contradicente*, which gives it as great an authority as of any Parliament that ever was.

"3. The King's Counsel was not heard in Ship Money or Knight-hood Money, wherein they had more right to claim to be heard than in this case.

"Besides all this, a fine is a judgment in the Common Pleas, and your Lordships' honours are not triable in the Courts below of Westminster Hall; but if a fine be allowed, they must be triable there, as well as other inheritances."

Vol. 13, 253,
Stowe's Parl.
Cas. 1.

The conclusion of the whole matter is summed up in the Journals of the House. The entry runs as follows:—

"Forasmuch as upon the debate of the petitioner's case, who claims the title of Viscount Purbeck, a question in law did arise, whether a fine levied to the King by a peer of the realm of his title of honour can bar and extinguish that title.

"The Lords spiritual and temporal in Parliament assembled upon very long debate, and having heard of His Majesty's Attorney-General, are unanimously of opinion, and do resolve and adjudge, that no fine now levied, nor at any time hereafter to be levied to the King, can bar such title of honour, or the right of any person claiming such title under him that levied or shall levy such fine."

The latest authority is—

*Earldom of
Norfolk Case,
1906 (latest
authority
against
validity).*

The Earldom of Norfolk Peerage Claim (1907, A. C. 10).

This was a claim by Lord Mowbray to the Earldom of Norfolk, in the peerage of England, as senior co-heir under a charter granted by Edward II. in 1312. That charter was in the terms following:—

"Edward King of England Lord of Ireland and Duke of Aquitaine to archbishops bishops abbots earls barons justices sheriffs &c. greeting. Know ye that we have given granted and by this our charter confirmed to Thomas de Brotherton our very dear brother all the right and honour and lordship which Roger le Bygod formerly Earl of Norfolk and Marshal of England had by the name of earl in the County of Norfolk and which came to the hands of the Lord Edward [the First] of famous memory formerly King of England our father by the grant surrender remise and quit claim of the same earl and are in our hand to have and to hold to the same Thomas and his heirs of his body lawfully begotten of us and our heirs with all and singular things thereto belonging by whatsoever name they may be called as entirely as the aforesaid earl had and held them on the day of the grant surrender remise and quit claim aforesaid for ever." The grant, therefore, did not purport to be a grant of a new earldom, but a grant of the old—the surrendered earldom. The surrender, which was made in 1302, was in plain terms. (See 1907, A. C. p. 13.)

The vital point in the case was whether the charter of 1312, founded as it was upon this surrender of 1302, was valid. If it was not, the claim failed. The matter was considered by the Committee for Privileges of the House of Lords, and in November, 1906, it was resolved: "That the Committee do report to the House that the petitioner has not established his claim to the dignity in question." The Earl of Halsbury, in his speech, said: "My Lords, in this case the claimant seeks to establish his right to the Earldom of Norfolk—an earldom created in the person of Hugh le Bygod in 1135. It may be assumed that he has satisfactorily established his pedigree, but in the course of it he is compelled to admit that he is not heir to the earldom so created, but has to rely on a surrender of the earldom to the King in 1302, and a grant in 1312 to Thomas de Brotherton of the earldom so surrendered. Now, the claimant has undoubtedly proved his descent from Thomas de Brotherton, but the fatal blot in his case is that the surrender on which he relies is invalid in law. It is settled law that 'no peer of this realm can drown or extinguish his honour, but that it descends to his descendants neither by surrender, grant, fine, nor any other conveyance to the King.' . . . This is binding on your Lordships. Something was suggested by the learned counsel as to what law or what understanding of the law your Lordships ought to apply. I know of no such jurisdiction as applicable to the law of England. Our duty is to the best of our ability to ascertain what the law is, and having ascertained it to give effect to it; to alter it or even modify it is the function of the Legislature, and not of your Lordships' House. No stronger illustration of this principle can be given than when, so late as 1818, the Court of King's Bench, with Lord Ellenborough presiding, felt itself compelled to allow the claim to wager of battle in an appeal of murder (*Ashford v. Thornton*, 1 B. & Ald. 405); and but for the intervention of an Act of Parliament (59 Geo. III. c. 46) some of his Majesty's judges might have had to preside over a single combat between the appellant and his antagonist. . . . I move your Lordships that we report to the House that the claimant has not established his claim to the dignity in question."

Lord Ashbourne, after stating the terms of the charter of 1312, said: "The earldom that was granted to Thomas de Brotherton in 1312 was the earldom that had been held by Roger le Bygod, and had been surrendered by him to King Edward I. in 1302. The suggestion made—not very strenuously—in argument that the charter might be regarded as conferring a new and independent Earldom of Norfolk on Thomas de Brotherton apart from the Bygod earldom cannot, I think, be maintained on any fair construction of that document. The fact that Thomas de Brotherton was repeatedly summoned to and sat in Parliament under the grant of

1312 cannot be considered as conferring any right to the earldom apart from the charter. No such case is advanced in his documents by the claimant, who is probably advised that a writ of summons and subsequent sitting in Parliament may ennoble the blood and confer right of peerage, but would hardly be accepted as sufficing of itself to confer an earldom. . . . Therefore a decision is primarily required on the legal construction and effect of the charter of 1312. . . . That earldom was the earldom of Roger le Bygod as held by him at the date of its surrender to King Edward I. in 1302. If that surrender was legal according to peerage law, then the earldom of Roger le Bygod was vested in the Crown, and could be re-granted in any subsequent year to any other subject; but was it legally competent for an earl or any other peer to surrender or destroy his earldom or peerage? Can any peer, by his mere personal act, oust and kill the rights of those entitled in remainder—it might be his children, brothers, or near kinsmen? Roger le Bygod had a brother living in 1302, and other kinsmen are stated to have been subsequently in existence. Supposing a claimant should now appear proving a clear descent from a Bygod entitled to the old earldom, what answer could be made? . . . The question really is narrowed to this—Had Roger le Bygod the legal right to make a valid surrender of the Earldom of Norfolk in 1302? The law on the subject does not now appear open to any doubt, and whenever the question came before your Lordships' House, the opinions expressed gave no sanction to any contrary intention. . . . In the *Grey de Ruthyn Case*, in 1640, a resolution of this House put the proposition with absolute clearness. It is printed in the third Report on the dignity of a peer, Vol. 2, p. 25: 'That no peer of this realm can drown or extinguish his honour, (but that it descends to his descendants) neither by surrender, grant, fine, nor any other conveyance to the King.'

"In 1678 the next question presented itself for decision in the *Purbeck Case*, and the resolution of the House was distinct and unqualified (Collins, p. 306): 'No fine now levied, nor at any time hereafter to be levied, to the King can bar such title of honour or the right of any person claiming such title under him that levied or shall levy such fine.' The House proceeded as if it were declaring clear law, and not as if it were laying down any novel proposition. The precedents of surrender that had been cited were brushed aside as having passed *sub silentio* and without contest. No case was then cited, and none was cited before us, where this House gave any countenance to the contrary proposition.

"It is not denied that the law is now clear, but it is urged that it is hard and unreasonable to apply it to such an early date as 1302; that it was not then known or declared. On the subject of hardness

and unreasonableness, it is not unworthy of note that this is not a case of disturbing and upsetting a long possession. On the contrary, it is a claim to call the title out of abeyance after over four centuries.

"If the law is clear, how can we avoid applying it? The law did not begin in 1626, or 1640, or 1678. It was suggested that, although no date could be arbitrarily fixed for its starting point, it may be it would be reasonable to say that it should not be applied until our parliamentary system was established. But even if that canon was laid down, I do not think it would help Lord Mowbray, for it could not be urged that the condition suggested was not satisfied before 1302, the date of the surrender. What has been called the Model Parliament met in 1295, and it is manifest that from that date, at all events, our parliamentary system may be regarded as established. (See Stubbs' Constitutional History of England, Chap. 15, and the recent Political History of England, Vol. III. Chap. 10.) In my opinion, the claimant has failed to make out his case, and I concur in the resolution moved by my noble and learned friend."

Lord Davey concurred, and said: "There is no doubt that a man cannot alien a title of honour either by surrender to the Crown or by grant to a subject. This is now settled law, and the reason is this, that it is a personal dignity which descends to his posterity and is fixed in the blood; in other words, he cannot by his own act alter or affect the status of his descendants or the other persons in the succession. But it is suggested rather than argued that, although this is now recognized to be the law, it was not accepted or treated as law in the reign of Edward II., and that the grant of 1312 ought to be treated as valid, and effect given to it in accordance with the ideas of the fourteenth century, not according to those which now prevail. This contention appears to me to be based on a fallacy, and to involve a misapprehension of the nature of the jurisdiction exercised by your Lordships in peerage cases. Whenever a Court or this House, acting judicially, declares the law, it is presumed to lay down what the law is and was, although it may have been misunderstood in former days, and this House is bound by its own declarations of the law in all matters within its jurisdiction; in fact, this House, exercising its judicial functions, has no jurisdiction or power to alter the law when once ascertained in a binding way. . . . For these reasons I concur in the resolution proposed by the noble and learned earl."

Lord James of Hereford and Lord Knutsford also concurred.

After these conclusive utterances, the invalidity of any surrender or other alienation of a peerage must be treated as finally established, and the law so settled must be taken to have been the law governing, by retrospective operation, all transactions since a date at least as far back as that of the Model Parliament (1295).

Final settle-
ment of the
law.

CHAPTER XII.

MERGER AND ATTRACTION.

Accession of a peer to the Crown extinguishes the peerage. It is well settled that on the accession of a peer of the realm to the throne his peerage or peerages *ipso facto* become merged in the Crown and extinguished, not because the Crown is the higher dignity, but because it is the source of all honour and dignity. Thus, where William, third son of George III., who had been created Duke of Clarence and Earl of Munster, ascended the throne in 1830 as William IV., his peerages, the dukedom and earldom, both became extinct; so it was held by the House of Lords in the *Oranmore Case*, 1836 (2 H. L. C. 911).

No merger where peerage in abeyance. But this doctrine of merger in the Crown does not apply, it is conceived, where a peerage is in abeyance, and the representation of one of the co-heirs vests in the Crown, the reason being that, as appears above (p. 106), a peerage in abeyance does not descend to the co-heirs. (See the *Camoy's Peerage Case*, 6 Cl. & Fin. 789; and *Braye Peerage Case*, *ibid.* 757.)

Lord Cairns expounds this principle. The *rationale* of the doctrine of merger as applied to the Crown is explained by Lord Cairns, L. C., in the *Buckhurst Peerage Case* (2 A. C. 1, 28). Referring there to the Dukedom of Cornwall, his Lordship says that "it"—the dukedom—"was held by the Prince of Wales for the time being—the Prince of Wales becomes the sovereign of the country—becoming the sovereign of the country it is impossible that he can hold any other dignity. The fountain and source of all dignities cannot hold a dignity from himself. The dignity, therefore, as a dignity to be held by the sovereign, terminates, not by virtue of any provision in its creation, but from the absolute incapacity of the sovereign to hold a dignity."

No merger of peerages in a subject. These words of Lord Cairns show that the doctrine of merger is necessarily confined in its operation to the Crown, with its unique attributes. There is no such thing as merger of one dignity in another where several are vested in a subject; each dignity is a separate inheritance, a separate and distinct incorporeal hereditament, the creation of the sovereign grace and favour, and nothing but forfeiture, escheat, failure of inheritable issue, or an Act of Parliament can destroy it.

This attribute of a peerage, which permits the co-existence of several peerages in one person, is recognized and illustrated in numberless cases.

The Crown has itself again and again granted to a peer additional titles, sometimes of higher, sometimes of lower, degree than his former title, but it has never been held and rarely suggested that there was any merger in such cases of the lower dignity in the higher, not even where the holder of an earldom of a particular county has afterwards received from the Crown a dukedom of the same county.

A theory of what is known as attraction in regard to peerages has been put forward, and from time to time has found support. This theory is that where the holder of a barony by writ receives a higher title limited to heirs male of his body, the barony is attracted by the higher title, and descends with it. The doctrine is obviously only that of merger in a qualified form, and with as little foundation. It has long since been exploded.

Exploded
theory of
attraction.

Two cases may, however, be cited in illustration, the *Barony of Roos Case* and the *Fitzwalter Barony Case*.

1. The Barony of Roos or De Ros (1666, Collins' Claims, 261).

The claim in this case was made by the Duke of Buckingham to the Barony of Roos. He claimed as heir general of the original grantee. The claim was opposed by the Earl of Rutland, who asserted that when his ancestor holding the barony was created Earl of Rutland the barony became merged in or attracted by the earldom, and ought, therefore, to descend in accordance with the limitations of the earldom.

The Attorney-General, on behalf of the earl, delivered an elaborate argument against the claim, urging, amongst other things, the inconveniences which would attend a decision in favour of the claimant:

1. An ancient earldom would lose the plumes of their honour.
2. An earldom doth usually carry the greatest part of the estate, so that if the barony should descend to heir general it would be poor, and that might cause degradation.
3. When the King makes a baron an earl he does not intend to multiply peers.
4. This would be a wrong to earls' eldest sons, who are entitled by courtesy to their fathers' baronies.
5. The alleged usage to the contrary.

In the result the matter was compromised, the Duke of Buckingham receiving the title of Lord Roos, but by the duke's death without issue the title returned later on to the house of Rutland.

2. The Fitzwalter Barony (1660, Collins' Claims, 168).

In this case, also, the claim was to an ancient barony by writ. It was shown that a former holder of the peerage was created Earl of Sussex in tail male, and that he had died without issue. The claimant contended that this creation did not affect the barony, and that he (the claimant) was entitled to the barony as heir general of the original grantee. On the other side, it was strenuously argued that the dignity was merged in or attracted by the earldom. Parliament having been prorogued, the matter was considered by the Privy Council in January, 1669, who took the view that the barony had merged in the earldom by vesting in Edward, last Earl of Sussex, and had consequently become extinct on his death without issue. The judges were then consulted, and they all unanimously agreed: (1) That the half-blood was no impediment to the descent of a dignity to an heir general; and (2) that if a baron in fee simple be made an earl, the barony will descend to the heir general, whether the earldom continue or become extinct; with which opinion and resolution his Majesty being "fully satisfied," the petitioner was directed humbly to address himself to his Majesty for his writ to sit in the House of Peers as Baron Fitzwalter. Nevertheless it was further declared that where the King is pleased, by writ, to summon an earl's eldest son to Parliament to sit there in the place of his father's barony, that this case is wholly different from the former. The petitioner was summoned and took his seat accordingly.

CHAPTER XIII.

TIME NO BAR.

It is well settled that mere delay in claiming a peerage will not bar the right to it. (See *supra*, p. 2.) A peerage once created devolves in accordance with the limitations of the origin of grant, unless and until it determines for default of persons inheritable or is extinguished by attainder or Act of Parliament, or unless and until the owner succeeds to the Crown, or unless the limitation is altered by Act of Parliament, and the same rule applies to a peerage in abeyance; the rights of the co-heirs are not barred by any mere delay, however great, in asserting them.

Time no bar
to peerage
claim.

Thus, in the *Hastings Case*, 1841 (8 Cl. & Fin. 157), the peerage was claimed and the title thereto established in 1841, after remaining unclaimed for 450 years—that is, since 1391. So in the *Camoy's Case*, 1839 (6 Cl. & Fin. 789), where the peerage was in abeyance, no one had sat in right of it since 1419, and yet in 1839—after a lapse of 420 years—it was held to be still subsisting, and was shortly afterwards called out of abeyance. The effect of lapse of time is well stated by the Lord Chancellor, Lord Cottenham, in the *Hastings Case* (*supra*), where he says: "One of the points for consideration was whether the absence of any exercise of the right to this title from the time it has been proved to have been last held by Sir John le Hastings, sixth Baron Hastings, who died in the year 1389, does not raise a presumption that there must at that time have been something which cannot now be traced, but which precluded the party who would otherwise have been entitled from claiming the barony at that period. . . . Though length of time itself is no bar to a claim to a dignity, yet where you are examining matters of fact, and endeavouring to ascertain the rights of persons who come forward to claim it, undoubtedly a great presumption is raised against the validity of that claim when you find the dignity descendible at a particular period in a way that would entitle a party to take it up, and you find that that claim was not made, or at all events, that the party did not succeed; unless there are circumstances in the case which enable your Lordships to come to a conclusion that the circumstance of the dignity

Hastings Case,
1841.
Camoy's Case,
1839.

Cottenham,
L. C., in
Hastings Case,
1841.

not having been taken up is satisfactorily explained. Where a title falls into abeyance, and is claimable either by two sisters or the descendants of two sisters, no doubt the prescription against the title does not exist, because neither of those parties could assert a claim to the title without the consent of the Crown; and if the Crown did not think proper to exercise its prerogative by deciding to which of the two sisters the title should descend, neither party could assert her title in her own name. If the Crown does not so decide in the first instance, after the title has fallen into abeyance, it may go on from generation to generation; and the circumstance, therefore, of its falling into abeyance and not being claimed, undoubtedly does not in that case raise any strong presumption against the claim. . . . There have been cases before your Lordships in which you have reported in favour of titles where that circumstance did not exist, and where the titles appear not to have been taken up by the next possessors, it not appearing that the circumstances of the cases were such as presented any impediment which would prevent them from claiming the titles. It must always depend on the particular circumstances of each case; it is at most but a presumption, that is to say, a presumption that there must have been something which cannot now be discovered, which might have prevented the party who would otherwise be entitled to the dignity from claiming it. . . . Sir John Hastings, who died in 1389, was the last possessor of the dignity, and there was this difficulty at your Lordships' bar: that the male descendants of Sir John by the second wife were the parties entitled to the peerage, but that they did not make any claim to it, and that from that period to the present there has not been any enjoyment of the dignity by any person in whom under those circumstances it would vest. If the case had stood nakedly upon those facts, although there are cases which would justify your Lordships in passing over that difficulty, and not concluding the case on account of not being able to explain how the non-enjoyment of the dignity happened—there would have been great difficulty in assuming that they were in fact entitled to the dignity, when no person descended from Sir John de Hastings had during so long a period asserted their title. But the circumstances of this case appear to me to remove that difficulty, because it appears that upon the death of the male line of Sir John de Hastings, called in the pedigree the second Baron Hastings, there being descendants of Elizabeth his daughter, the question arose how far the descendants of that daughter were entitled in preference to the descendants of the son of the second marriage, there being a rule of law applicable to land (*possessio fratris*), and the question arising whether the rule of law applicable to land did or did not apply to a dignity. . . . From the year 1540 the title was in abeyance, and in 1641, when it appears that it was decided

that the *possessio fratris* did not apply to a dignity, the parties then entitled to this dignity were not persons who could of their own authority take up and exercise the privilege, but they were the descendants of daughters who could not take the privilege without the act of the Crown declaring in whose behalf the abeyance should be determined. . . . When, therefore, your Lordships see that at the period at which the ancestors of the present claimants would have been entitled to assert the claim to the present dignity, a question of law existed which prevented that right from being asserted until a period at which the title descendible in the line of issue male of the second marriage had fallen into abeyance, I think you have circumstances proved sufficient to explain how it happened that the title had been so long suspended, and why no person came forward to assert it."

The principle that lapse of time is no bar received recognition more than once in the recent *Norfolk Case*, 1906 (1907, A. C. 10). During the argument of the case counsel for the claimant said: "It is firmly established that no length of time bars the peerage or the right to have it called out of abeyance so long as the facts are established. I do not propose to waste the time of your Lordships' Committee by citing authorities for that proposition, which may now be regarded as elementary." And in answer the Earl of Halsbury said, "There is no doubt as to that."

Principle
recognized in
Norfolk Case,
1906.

A later remark by Lord Ashbourne involves a similar recognition. Roger Bygod had purported, in 1302, to surrender the earldom, and this surrender was, in 1906, held to have been invalid; and Lord Ashbourne, commenting on this state of things, said: "Roger le Bygod had a brother living in 1302, and other kinsmen are stated to have been subsequently in existence. Supposing a claimant should now appear, proving a clear descent from a Bygod entitled to the old earldom, what answer could be made?"

Neither can a good title to a dignity be barred by a so-called adverse possession, however long, for there is no such thing as adverse possession of a peerage.

So-called
adverse
possession
no bar.

The *Willoughby of Parham Case* furnishes a good instance of this. In that case the barony of Willoughby of Parham was granted in tail male in 1 Edw. VI., 1547. The title descended to the eldest son of the grantee and the heirs male of his body until 1685, when his male issue failed, and thereupon the title was claimed by and allowed to the descendants of the fifth son of the grantee, and was enjoyed by him and his issue male until 1765—that is, for a period of eighty years—when the heirs male of the fifth son became extinct. Two years later, in 1767, Henry Willoughby claimed the barony as heir male of the body of the second son of the grantee. The petition was referred to the House of Lords, and the title of the claimant to the

The *Willough-
by of Parham
Barony Case*,
1767.

barony by pedigree proved being established, the following resolution, as appears from the Journals of the House, was passed:—

Journals,
Vol. 31, 530.

“That the petitioner had a right to the title, dignity, and peerage of Willoughby of Parham, which was enjoyed from the year 1680 to the year 1765 by the male line, then extinct, of Sir Thomas Willoughby, youngest son of Charles, Lord Willoughby of Parham, who were successively summoned to Parliament by descent, in virtue of letters patent bearing date the 16th of February, 1 Edw. VI., and sat as heirs male of the body of Sir William, created Lord Willoughby of Parham by the said letters patent, contrary to right and the truth of the case. It then appearing that Sir Ambrose Willoughby, the second son of the said Charles, and elder brother of the said Sir Thomas, who was averred to have died without issue, left a son, and that the claimant was great-grandson and heir male of the body of such son, and consequently heir male of the body of the said Sir William, who was created Lord Willoughby of Parham. The male line of the eldest son of the said Charles, Lord Willoughby of Parham, having failed in or before the year 1680. And that the proof of the petitioner's pedigree being clear, the contrary possession ought to be no bar to his claim; as there was no person in being interested under such possession, without prejudice to the question if there was.”

Ibid. 537.

A writ of summons was accordingly issued to Henry Willoughby, the petitioner, and he took his seat as Lord Willoughby of Parham.

CHAPTER XIV.

REPRESENTATIVE PEERS.

By the Act of Union of England with Scotland, 1706 (5 Anne, c. 8), provision was made for the union of the two kingdoms of England and Scotland into one kingdom by the name of Great Britain, and for the election from time to time of sixteen Scotch representative peers to sit in the Parliament of Great Britain. Scotch representative peers.

This Act has been amended by 10 & 11 Vict. c. 52, and by 14 & 15 Vict. c. 87 (1851).

Under these Acts whenever Parliament is to be convened a proclamation under the Great Seal has to be made for the election, by the peers of Scotland, of the sixteen representative peers, and their election is notified in due course to the Clerk of the House of Lords. The representative peers so elected are, by the Act of Union, given all privileges of Parliament which peers of England have or may have after the Union, and in particular the right to sit in Parliament and the right of sitting on the trial of peers. The Act of Union also gives to all peers of Scotland rank and precedence next after the peers of the like order and degrees in England at the time of the Union, and they are to enjoy all privileges of peers as fully as the peers of England; but the right of sitting in the House of Lords is confined to the sixteen representative peers. Act of Union, 1706, and amending Acts. Main provisions.

The Acts make no provision for any addition to the Scotch peerage.

A Scotch peer may not sit in the House of Commons.

A Scotch representative peer is entitled to sit during the continuance of the Parliament to which he was elected. Other legal incidents as to Scotch peerages.

A Scotch representative peer may receive a peerage of the United Kingdom, but he thereupon ceases to be a representative peer, and a new election takes place to fill the vacancy.

Under the two Acts of Victoria above mentioned the House of Lords has a considerable measure of jurisdiction as to the determination of the right to vote at elections of representative peers for Scotland and in other respects.

By the Act of Union of Great Britain and Ireland, 1800 (39 & 40 Geo. III. c. 67), similar provision was made for the union of Great Irish representative peers.

Britain and Ireland into one kingdom by the name of "the United Kingdom of Great Britain and Ireland," and for the election of twenty-eight representative peers to sit in the House of Lords of the United Kingdom.

Act of Union,
1800.

The Act provides that the twenty-eight representative peers are to be elected for life, and the mode of election is to be in accordance with an Act of the Irish Parliament scheduled to the Act of Union and passed immediately before that Act.

Position of
an Irish
representative
peer.

The acquisition by an Irish representative peer of a peerage of the United Kingdom does not vacate his position as a representative peer.

In case of an Irish representative peer dying a new representative peer is to be elected by the Irish peers.

All questions touching the rotation or election of Irish representative peers to sit in the Parliament of the United Kingdom are to be decided by the House of Lords.

An Irish peer is not to be disqualified from being elected to serve, and serving, if he thinks fit, for any county, city or borough of Great Britain in the House of Commons, unless previously elected to sit as a representative peer in the House of Lords; but whilst a member of the House of Commons he cannot claim privilege of peerage or serve as a representative peer or vote at the election of such representative peers, and he is to be liable to be sued, indicted, proceeded against, and tried as a commoner for any offence with which he may be charged.

When addi-
tional Irish
peers may be
created.

The King may create additional Irish peers and make promotions in the Irish peerage, but there is to be no new creation until three of the Irish peerages existing at the time of the Union shall have become extinct. When the peerage of Ireland is reduced to one hundred peerages, exclusive of those holding a peerage of Great Britain, the King may create one Irish peer as often as any one of such one hundred peerages fails by extinction, or as often as one Irish peer becomes entitled by descent or creation to an hereditary seat in the House of Lords; the true intent and meaning of the regulations or articles being that "at all times after the Union it shall and may be lawful for his Majesty, his heirs and successors, to keep up the peerage of that part of the United Kingdom called Ireland to the number of one hundred over and above the number of such of the said peers as shall be entitled by descent or creation to an hereditary seat in the House of Lords of the United Kingdom." On the same subject, see *Lord Fermoy's Case*, p. 171, *infra*.

Aboyance
of Irish
peerage.

A peerage in abeyance is to be deemed an existing peerage, and no peerage is to be deemed extinct unless on default of claimants to the inheritance of such peerage for the space of one year from the death of the person last possessed thereof. Failing such claim the peerage

is to be deemed extinct, but nothing in these provisions is to prevent any person afterwards putting in a claim to the peerage so deemed extinct; and if such claim is allowed by the House of Lords and reported to his Majesty, the peerage is to be considered as revived. If in the meantime a new creation has taken place no new right of creation is to accrue to his Majesty in consequence of the next extinction of any Irish peerage. (See *Bloomfield Peerage*, 2 Dow & C. 344.)

By 20 & 21 Vict. c. 23, when the seat of any one of the twenty-eight representative peers of Ireland is vacated the writ to be issued to the Chancellor of Ireland (see p. 170) is to direct him to cause writs to be issued by the Clerk of the Crown in Ireland to the peers entitled to receive the same, and also to every peer certified by the House of Lords as entitled to vote.

Writ for filling a vacancy in the representation.

The Irish representative peers are given all privileges which peers of Great Britain have or may have after the Union, and in particular the right to sit in Parliament and the right of sitting upon the trial of peers.

Privileges, procedure, &c.

The Act also gives to all Irish peers existing at the time of the Union rank and precedence next after all the persons holding peerages of the like orders and degrees in Great Britain subsisting at the time of the Union and according to the dates of their creations.

The Act also provides that all peerages both of Great Britain and Ireland now subsisting or hereafter to be created shall in all other respects from the date of the Union be considered as peerages of the United Kingdom, and that the peers of Ireland shall, as peers of the United Kingdom, be sued and tried as peers, except as aforesaid, and shall enjoy all privileges of peers as fully as the peers of Great Britain, the right and privilege of sitting in the House of Lords and the privileges depending thereon and the right of sitting on the trial of peers only excepted.

As to the power to create further peers of Ireland above mentioned, subject to the proviso that no new creation of any such peers shall take place after the Union until three of the peerages of Ireland which shall have been existing at the time of the Union shall have become extinct—the meaning of this proviso was considered in *Lord Fermoy's Case*, 1856 (5 H. L. C. 718), and it was held that the word "peerage" in this proviso is used in the third sense above mentioned (p. 7): that it means the status and condition of a peer, and therefore where one person held several titles, by any one of which he could sit in the Irish House of Peers, so long as any one of those titles remained in him or his descendants the loss of any of the others did not constitute an extinction of a peerage within the meaning of the Act.

Lord Fermoy's Case, 1856, as to creation of further Irish peers.

*Seemle, no
duty in Crown
to keep up
the number
of Irish peers.*

It has been suggested that the power given to the Crown of keeping up the Irish peerage to one hundred in effect imposes a duty on the Crown so to keep it up; but the words of the Act are "it shall and may be lawful," and there appears to be nothing in the Act or in the circumstances sufficient to construe the words as imposing a duty on the Crown. The construction of such words was carefully considered in *Julius v. The Bishop of Oxford*, 1880 (5 App. Cas. 214), and it was held that *prima facie* the words are merely permissive and enabling. "The words," said Lord Cairns, L. C., "'it shall be lawful,' being, according to their natural meaning, permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

In the same case, Lord Penzance said: "The words are distinctly words of permission only; they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do or do not create a duty in the person on whom it is conferred to exercise it."

"The language," said Lord Selborne, "(certainly found in authorities entitled to very high respect), which speaks of the words 'it shall be lawful,' when used in public statutes, as ambiguous and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is, in my opinion, inaccurate. I agree with my noble and learned friends who have preceded me that the meaning of such words is the same whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never in themselves significant of any obligation."

CHAPTER XV.

PRECEDENCE OF PEERS.

THE precedence of peers in Parliament as between the members of the same degree of peerage was in early times, it is apprehended, regulated by the common law rule of ancienty, that is, by the age of the respective peerages. It is clear, however, that Henry VI. arrogated to himself the right to interfere with this order, and settled for himself the precedence of peers. Precedence.

Several instances may be cited from his reign. Thus, we find that King, in the twenty-second year of his reign (R. C. V. 243), granting to Henry Beauchamp that he should be the premier earl of England. This was by letters patent. Afterwards the King made him Duke of Warwick (24 Hen. VI.; R. C. V. 244), and appointed that he should have his seat in Parliament next after the Duke of Norfolk and before the Duke of Buckingham. Grants of precedence by Henry VI.

In the same year, the King by patent purports to give to John, Duke of Exeter, precedence next after the Duke of York and his heirs, Dukes of York. (R. C. V. 248.)

Ten years later, the same King, on the petition of the Commons, grants special precedence to his half-brothers, Edmund of Hadham and Jasper of Hatfield, whom he had created Earl of Richmond and Earl of Pembroke respectively, and places them immediately after the dukes of England.

Again, in 31 Hen. VI., we have the King granting the Earldom of Richmond to his half-brother, Edmond of Hadham, with special precedence. (R. C. V. 295.)

A few years later (27 Hen. VI., 1448), a controversy as to precedence having arisen between the Earl of Arundel and the Earl of Devonshire, the matter was determined by the King with the advice of the lords spiritual and temporal. (See *supra*, p. 9.)

The precedence of peers has, since 1539, been regulated by the statute 31 Hen. VIII. c. 10, intituled "An Act for placing the Lords in the Parliament." Statutory regulation under Henry VIII.

The preamble to this Act runs thus: "Forasmuch as in all great councils and congregations of men having sundry degrees and offices

in the Commonwealth it is very requisite and convenient that an order should be made and taken for the placing and sitting of such persons as be bound to resort to the same to the intent that they knowing their places may use the same without displeasure or let of the Council; therefore the King's most royal Majesty although it appertaineth unto his prerogative royal to give such honour reputation and placing to his counsellors and other his subjects as shall be seeming to his most excellent wisdom is nevertheless pleased and contented for an order to be had and taken in this his most high Court of Parliament that it shall be enacted by the authority of the same in manner and form as hereafter followeth." Then follow provisions for the placing, amongst others, of the archbishops and bishops, of the Lord Chancellor, the Lord Treasurer, the Lord President of the Council, the Lord Privy Seal, the Lord Great Chamberlain, the Constable, the Marshal, the Lord Admiral, the Lord Steward, the King's Chamberlain, and the King's Secretary. The Act then proceeds as follows: "That all dukes not afore-mentioned, marquises, earls, viscounts, and barons not having any of the offices aforesaid, shall sit and be placed after their anciently as it hath been the custom." The Act also provides: "That in all trials of treason by peers of the realm, if any of the peers that shall be called hereafter to be triors of such treason shall happen to have any of the offices aforesaid that then they having such offices shall sit and be placed according to their offices above all the other peers that shall be called to such trial in manner and form as is above mentioned and rehearsed."

Comments of
Redesdale
Committee
on Act.

On this Act the Redesdale Committee make the following comments (fourth Report, 318):—

"If the statute of the 31st of Henry VIII. for placing the Lords was, as its language seems to import, and as the language used in prior contests for precedence seems also to import, declaratory of the ancient law, the King had no right to give by his patent a right to the same precedence which would have belonged to the grantee if he had been entitled by descent to a peerage of ancient creation distinguished by the same name but forfeited by attainder. Henry VI. attempted to give by patent precedence to peers in derogation of the rights of other peers having the same degree of dignity of more ancient creation. The right of the Crown so to interfere on the subject of precedence seems then to have been questioned, and the advancement of the Lord Beaumont to the dignity of viscount (a new name of honour then first given) seems to have been a contrivance to evade the effect of the ancient rule. . . . Probably the statute of Henry VIII. was made to declare the law in consequence of the many attempts to grant precedence contrary to the ancient rule during the unsettled government of some of his predecessors. . . . The high

notions entertained by James I. of the extent of the royal prerogative seem to have led to the extraordinary proceedings on the claim of the peerage of Abergavenny in the reign of that prince; and the singular patent granted to him and set forth in the Appendix III. to the Report of 26th July, 1820, must have been founded on the same notions, derived perhaps from irregular proceedings in the reigns of Henry VI. and Edward IV. Charles I., in the patent granted by him to James Touchet, son of Mervin Lord Audley, attainted of felony and executed as after stated, probably meant to restore the ancient dignity of Lord Audley, lost by that attainder, but this having been resisted, the dignity was specially restored by Act of Parliament. Charles also attempted, by his patent, to give precedence to the Earl of Banbury, in prejudice to the rights of peers before created by him. . . . Charles made a similar attempt by his patent, creating William Howard and his wife, the heiress of the family of Stafford, Baron and Baroness Stafford, and this being resisted when the newly-created baron took his seat in the House, Charles followed the example of Henry VI. in the case of Lord Beaumont, and prevented further discussion of the question by granting the dignity of viscount to Lord Stafford, thereby giving by creation of a superior dignity a precedence above that which he had attempted to give contrary to law."

At p. 319 of the same Report the Committee continue their comments:—

"These attempts of the Crown," they say, "to give precedence by patent in derogation of the law of ancientry, may have been founded on the claim of a general right to avoid the effect of established law by patents and proclamations containing a clause intended to give them effect, notwithstanding any law to the contrary, commonly called a *non obstante* clause, a claim which, if submitted to, would give to the Crown, in effect, legislative power without the assistance of the two Houses of Parliament. This assumption of power was finally condemned by the Act of 1 Will. & Mary for declaring the rights and liberties of the subject, commonly called the Bill of Rights." Stubbs' Charters, 521.

The precedence of peers has undergone some modification by the Acts of Union with Scotland and Ireland. Thus, the Act of Union with Scotland provides that all peers of Scotland shall be peers of Great Britain, and have rank next after the peers of the like degree in England at the time of the Union. (Art. 23 of Act of Union (5 Anne, c. viii.), 1st May, 1707. See *supra*, p. 169.) Effects of the Acts of Union.

Similarly, the Act of Union with Ireland provides that the peers of Parliament on the part of Ireland shall have the same privileges as the lords on the part of Great Britain, and . . . the temporal peers of Ireland shall have rank next after the peers of the like rank in Great Britain at the time of the Union. So provided by the Act of Union

(39 & 40 Geo. III. c. lxvii.), which came into operation 1st January, 1801.

Coke's statement of the law.

The rule as to the determination of questions of precedence among the peers is given by Coke in 4 Inst. 360, and still holds good. "If any question," he says, "be moved in Parliament for privilege or precedence of any Lord of Parliament that is to be decided by the Lords of Parliament in the House of Lords as all privileges and other matter concerning the Lords' House of Parliament are, as privileges and other matters concerning the House of Commons are by the House of Commons to be decided."

Names of a few old peerages.

It may be of interest to specify a few of the most ancient peerages of England of each rank or degree now on the Roll, and the order of their precedence:—

Dukedoms.

These rank as follows:—

1. The Dukedom of Norfolk, created 28th June, 1483.
2. The Dukedom of Somerset, created 15th February, 1547.
3. The Dukedom of Richmond, created 9th August, 1675, &c.

7/

Marquisates.

The Marquisate of Winchester, created 12th October, 1551.
The Marquisate of Lansdowne, created 6th December, 1784.

Earldoms.

The Earldom of Shrewsbury, created 20th May, 1442.
The Earldom of Derby, created 27th October, 1485.
The Earldom of Huntingdon, created 6th December, 1529.
The Earldom of Pembroke, created 11th October, 1551.
The Earldom of Devon, created 3rd September, 1553.
The Earldom of Suffolk, created 21st July, 1603.

Viscounties.

The Viscounty of Hereford, created 2nd February, 1549—50.
The Viscounty of Bolingbroke, created 7th July, 1712.

Baronies.

The Barony of De Ros, created 22nd December, 1264.
The Barony of Mowbray, created 28th June, 1283.
The Barony of Hastings, created 23rd June, 1295.

The Barony of Clinton, created 6th February, 1299.
The Barony of De Clifford, created 29th December, 1299.
The Barony of Zouche, created 13th January, 1308.
The Barony of Beaumont, created 4th March, 1309.
The Barony of Grey de Ruthyn, created 13th December, 1324.
The Barony of Camoys, created 28th August, 1383.
The Barony of Berkeley, created 20th October, 1421.
The Barony of Berners, created 26th May, 1455.
The Barony of Willoughby de Broke, created 12th August, 1491.
The Barony of Conyers, created 17th October, 1509.
The Barony of Vaux of Harrowden, created 27th April, 1523.
The Barony of Braye, created 3rd November, 1529.
The Barony of Windsor, created 3rd November, 1529.
The Barony of North, created 17th February, 1553—4.

CHAPTER XVI.

PEERAGES BY TENURE.

Peerages by
tenure
formerly
supposed
to exist.

THE idea long prevailed that there were in England anciently peerages by tenure; that is to say, dignities or titles of honour annexed or appendant to the possession of certain castles and demesnes held of the King *in capite*. Such an idea certainly prevailed in the time of Henry VI., as appears from the *Arundel Case* (*infra*, p. 179), and it was shared by so great an authority as Lord Coke, who considered that there might be peerages by prescription, founding himself on the *Arundel Case*. In the *Abergavenny Case*, again, in the time of James I., the theory was clearly formulated and strenuously contended for. Selden, in his "Titles of Honour," adopted the theory, and wrote much and learnedly in support of it. So did Madox in his "*Baronia Anglica*," and Blackstone treats it as historically well founded.

"The right of peerage," says the author of the Commentaries (Book I. Chap. XII.), "seems to have been originally territorial; that is, annexed to lands, honours, castles, manors, and the like, the proprietors and possessors of which were (in right of those estates) allowed to be peers of the realm, and were summoned to Parliament to do suit and service to their sovereign; and when the land was alienated the dignity passed with it as appendant. Thus the bishops still sit in the House of Lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands; and thus, in 11 Hen. VI., the possession of the Castle of Arundel was adjudged to confer an earldom on its possessor; but afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and, instead of territorial, became personal. Actual proof of a tenure by barony became no longer necessary to constitute a Lord of Parliament, but the record of the writ of summons to him and his ancestors was admitted as a sufficient evidence of the tenure."

Lord Hatherley refers to the matter in the *Buckhurst Peerage Case* (2 App. Cas. 34): "A notion was afloat," he says, "that that which prevails in the greater part of Europe, I believe—namely, that titles of honour are attached to certain properties, and may be held when

so attached by any person acquiring the property—might also exist in this country. That is a notion of which at one time there may be found traces in our law books.”

In the circumstances the matter calls for a careful examination of the authorities, and the first is—

1. The Arundel Case.

In this case the castle and honour of Arundel appear to have been granted by King Henry II. to William de Albini; from him descended, through a female, Thomas Fitzalan, Earl of Arundel, in 4 Hen. V. Thomas died without issue, and thereupon the Castle of Arundel, by virtue of an entail made by his grandfather in 21 Edw. III., descended to Sir John Fitzalan, cousin and next heir male to the said Thomas. This John was summoned to Parliament in 7 & 8 Hen. VI. by the title of John Arundel de Arundel, Chevalier. In 11 Hen. VI., being then in France upon the King's military service, he presented a petition to the King in Parliament that he might be admitted to his proper place there and also to his place in all public councils as Earl of Arundel, by reason that his ancestors, Earls of Arundel, lords of the castle, honour and signory of Arundel, had used to enjoy their place and sit in all Parliaments and Councils of the King and his most noble progenitors time out of mind as lords of the castle, honour and signory before expressed, whereunto the title was united and annexed and which were then in his possession. This petition was opposed by John Mowbray, Duke of Norfolk, but ultimately an Act was passed reciting that the above petitions were read and maturely considered by the judges and the King's Council, and it being considered that Richard Fitzalan, cousin and one of the co-heirs of Hugh de Albini, sometime Earl of Arundel, was seised of the same castle, honour and signory in his demesne as of fee, and that by reason thereof, without any creation, he was thereupon Earl of Arundel, and peaceably enjoyed the name, estate and honour of Earl of Arundel in all Parliaments and Councils as long as he lived, without any interruption or restraint: the King, therefore, well weighing the premises, and likewise considering the many services done by the said John in his realm of France and Duchy of Normandy, desiring to do him all right therein, did, by the advice of the prelates, dukes, earls, and barons then assembled in Parliament, admit him to the place and seat in Parliament as Earl of Arundel, in the same manner as his ancestors Earls of Arundel theretofore had the same, saving the rights of the King and of the Duke of Norfolk. (Rot. Parl. Vol. IV. p. 441.)

Later on the castle and honour of Arundel descended to Henry Fitzalan, Earl of Arundel, who settled the same on his grandson, ^{The Act of 3 Car. I. annexing}

Arundel
Castle to
earldom in
tail.

Phillip Howard, the eldest son of Thomas, Duke of Norfolk. This Phillip was summoned to Parliament as Earl of Arundel in 22 Eliz., and appears from the Journals to have sat in the place of the ancient Earls of Arundel. Afterwards, in 3 Car. I., Thomas, Earl of Arundel, obtained a private Act for annexing the castle and honour of Arundel to the title, name, and dignity of Earl of Arundel, and for entailing the same. The preamble of this Act recited that the "title name and dignity of Earl of Arundel is and from the time whereof the memory of man is not to the contrary hath been real and local and hath from the time aforesaid belonged unto and been used and enjoyed by himself and such of the ancestors of the late Earl of Arundel as have had in them and enjoyed the inheritance of the castle honour and lordship of Arundel in the county of Sussex and by reason of the inheritance and seisin of the said castle honour and lordship the said Earl and his ancestors from the time whereof the memory of man is not to the contrary have been Earls of Arundel and have thereby had used and borne and enjoyed the title name and dignity of Earl of Arundel and thereby also have from the time aforesaid had and enjoyed their place in your Majesty's Parliaments and Councils and elsewhere as Earls of Arundel."

And it was thereupon enacted "that the said title name and dignity of Earl of Arundel and the castle honour and lordship of Arundel and the titles names and dignities of Lord Fitzalan Lords of Clun and of Oswaldestre and Maltravers and all places, pre-eminences, arms, ensigns, and dignities of the said earldom, castle, honour, and baronies, belonging to the borough and manor of Arundel and divers other lands and hereditaments specified in the Act might and should for ever by virtue of the said Act stand and be and remain conveyed assured limited and settled to him the said Thomas Earl of Arundel and Surrey and the heirs male of his body and for default of such issue to the heirs of his body and for default of such issue to his uncle Lord William Howard and the heirs male of his body and for the default of such issue to the heirs of the body of Lord William Howard and for default of such issue to the said Thomas Earl of Arundel and Surrey and his heirs for ever with provision avoiding dowers and alienation by any of the persons to whom the premises should come."

Comments of
Redesdale
Committee on
the *Arundel*
Case.

On this the Redesdale Committee make the following comment (third Report, p. 115): "It seems, therefore, that the proceedings on the claim of the dignity of Earl of Arundel in the reign of Henry VI. ought to be considered as an anomaly, influenced by political views, and decided apparently without much discussion and without the assistance of the judges. The claim of the dignity was advanced on singular grounds—not as a general assertion that a territorial property which had given the name of earl to a former

possessor would in all cases give the dignity of earl to another, but that the dignity of earl was, for some reason not stated, to be deemed incident to the possession of that particular territorial property. The assertion of fact seems not to have been true, and not to have been made the subject of enquiry when the question was decided; the person who decided on the title assuming that, because one person who had had the territorial property in the reign of Edward I. had been summoned to Parliament as an earl, and no patent or instrument of creation appeared, therefore he must have had a right to the dignity merely by force of his possession of the property."

2. The De Lisle Case.

In 19 Hen. VI. (1441), the Barony of De Lisle was by charter granted to John Talbot, whose mother was a daughter and co-heir of Warine de Lisle. The limitation was "to John Talbot, his heirs and assigns for ever, being tenants of the Manor of Kingston Lisle." The charter recites as a fact that Warine de Lisle and his ancestors, by reason of the lordship and Manor of Kingston Lisle, had from time to time, whereof the memory of man was not to the contrary, the name and dignity of Baron and Lord Lisle, and by that name had seat in Parliament, &c., as other barons of the realm do. Whether the grounds assigned for granting the charter did or did not constitute a valid claim in law it is not necessary here to discuss. It is sufficient that the charter shows that a claim to a barony founded on prescription or tenure was in fact put forward.

It may be noted, however, that in both the above cases the claim was to a peerage by prescription—not quite the same as a peerage by tenure, though closely allied to it.

3. The Abergavenny Case.

This case (1604) is another instance of a claim made to a barony as a barony by tenure. It is reported in Collins' Claims, p. 61. The greater part of the matter there set out is to be found in the State Papers (Domestic Series), Elizabeth. (See Calendar, Vol. 219, No. 97, anno 1588.) The claimants were—

- (1) Sir Thomas Fane, who had married Mary, the only daughter and heir of the last Lord Abergavenny; and
- (2) Sir Edward Nevill, the nephew and heir male to the last Lord Abergavenny.

Sir Thomas Fane claimed in right of his wife, asserting that the barony was a barony by writ and vested in his wife as heir general.

Sir E. Nevill claimed the title under the will of a former lord, by

*De Lisle
Barony (grant
by charter in
1441).*

*Abergavenny
Case, 1604.*

which the Barony of Abergavenny and all his other castles, lordships, &c. were entailed.

He asserted that the barony was a barony by tenure, annexed to the possession of the Castle of Abergavenny. The case was referred by James I. to the House of Lords. The argument was very full and elaborate and lasted for seven days, but the point of tenure or writ was never in fact decided. The Journals state that the question seemed nevertheless not so perfectly and exactly resolved as might give clear and undoubted satisfaction to all consciences or judgments of all the Lords for the precise point of right; and yet so much was shown and alleged on each side as in the opinion of the House, if it might stand with the King's good pleasure and grace, made them both capable and worthy of honour. It was therefore moved and so agreed that information should be given unto the King's Majesty of all the proceedings of the said Court in the matter, and that humble suit should be made to his Majesty from the Lords for the ennobling of both parties by way of restitution—the one to the said Barony of Abergavenny and the ancient place belonging to the same, and the other to the Barony of Le Despencer. King James agreed to the proposal of the House, but nevertheless required the Lords to proceed to determine upon which of the said candidates the dignity of the Barony of Abergavenny should in their judgment be settled. The Lords, in obedience to this requisition, resolved that Sir Edward Nevill should have the Barony of Abergavenny, and he was summoned accordingly, the other claimant receiving the Barony of Le Despencer. The question whether the Barony of Abergavenny was or was not a barony by tenure was thus in effect avoided by a compromise.

4. The Fitzwalter Barony.

*Fitzwalter
Case, 1668.*

The next case is that of the Barony of Fitzwalter, 1668 (Collins' Claims, 287). Here, as in the *Abergavenny Case*, there were rival claimants for the barony, one of them asserting, the other denying, that it was a barony by tenure. The claims were heard in 1669 before the Privy Council, assisted by the two Chief Justices, Chief Baron Sir Mathew Hale, and other learned lawyers. But it appears from the report that after some discussion, both parties being ordered to withdraw and the nature of a barony by tenure being considered, such barony by tenure was found to have been discontinued for many ages and not in being, and so not fit to be revived or to admit any pretence or right of succession thereupon; and the pretence of a barony by tenure being declared for weighty reasons not to be one to be insisted upon, the point was abandoned and the argument proceeded to other matters.

The whole question of peerage by tenure is thoroughly sifted by the Redesdale Committee in their Reports (1819-22), and the conclusion they come to is that there is no sufficient evidence that there were then (that is, at the date of the Reports) any such peerages by tenure in existence, or had ever been since the time of Henry III. or Edward I. The various objections raised by the Committee to such peerages are set forth *infra*, p. 184. Finally, in 1861, came

Redesdale
Committee's
Reports on
this subject.

The Berkeley Case (8 H. L. C. 21).

The petitioner's claim in this case was based on prescription. It set out that the claimant's predecessors in title had, time out of mind, held the castle and Barony of Berkeley in barony, and by reason of the seisin thereof had been entitled to be, and had been, summoned to Parliament, and had had voice and place in Parliament as barons of the realm. The claimant then went on to show that the castle and manor were granted in barony by Henry III., and that the title had always passed with the property, and that he, the claimant, was entitled to the property for an estate of freehold, namely, for life, under the will of the last Earl and Baron of Berkeley, and he contended that, although the statute 12 Car. II. c. 24, had abolished knight-service and tenures, the peerage rights incident to such a barony by tenure as his were preserved by sect. 11.

*The Berkeley
Case, 1861.*

The claim was made in the year 1858, and referred in the usual way to the House of Lords. No pains or expense were spared in collecting the best possible evidence in support of the claim, and the services of the most distinguished peerage lawyers of the days, including Mr. Fleming, Q.C., were retained. Nothing, therefore, that research and learning could do to solve the problem of peerage by tenure was left undone.

The Committee for Privileges, too, who heard the case argued, consisted of some of the most eminent judges who have ever adorned the English bench—Lord Campbell, L. C., Lord Cranworth, Lord St. Leonards, Lord Chelmsford, and Lord Redesdale. All these were, in the result, unanimous in their opinion that the claimant had not made out his claim to the title, honour, and dignity of Baron Berkeley of Berkeley Castle, in the county of Gloucester, and the resolution embodying this conclusion was reported to and adopted by the House.

The speeches of the members of the Committee are replete with learning and research, and may be said to finally and effectually dispose of the notion that there are any baronies by tenure now in existence. It is unnecessary to set out the opinions in detail. It is sufficient to say that the objections relied on by the members of the Committee are all, or almost all of them, summed up in the objections

enumerated below—objections, most of them, already indicated by the Redesdale Committee in their various Reports.

Objections to
peerage by
tenure.

They may be formulated thus:—

1. The notion of a peerage by tenure offends against the well-settled principle that the Crown is the fountain of honour and dignity, for if a peerage is attached to land, which is alienable, it follows that the owner can, by transfer of the land, whether by deed or will, make the transferee a peer, and so confer on him the right to a writ of summons. (*Berkeley Case*, 8 H. L. C. 77; Redesdale Committee, first Report, 397.)

2. A peerage by tenure is inconsistent with the idea of hereditary nobility—a cardinal principle of English peerage law—for if a peerage is attached to land and passes with it to a transferee, the prior owner who was a peer ceases to be a peer. (*Berkeley Case*, pp. 77, 133; Redesdale Committee, first Report, 397; third Report, 61.)

3. It is of the essence of a peerage in England that it has been—at any rate, since the time of Edward I.—inalienable, whereas a peerage by tenure, if now existing, necessarily possesses the quality of transferability (*Ibid.*; Redesdale Committee, first Report, 397, 398), and might even be bought and sold at auction. (*Berkeley Case*, pp. 78, 87, 98.)

4. It is a settled rule that the right to be a peer of the realm is ascertained by the records of the House, by its traditions, usages, and precedents, whereas if a peerage is attached to land and passes with it, the title thereto may be determined by the Courts of law, seeing that they have jurisdiction to determine the title to land. (Redesdale Committee, first Report, 397.)

5. If a peerage is attached to land and passes with it, it follows that a peerage may be lost or gained by lapse of time; for even a trespasser can acquire title to land under the Statutes of Limitation, and, therefore, to a peerage attached to the land. (Redesdale Committee, first Report, 397, 398.)

6. If a peerage is attached to land in the sense supposed it would, at any rate since the statute of 12 Car. II. c. 24, for the abolition of tenures, pass with the land to a mortgagee, or to the trustees of a settlement, or to the trustees of a term, or to the trustees or assignees in bankruptcy, and thus carry the peerage into the hands of strangers. (*Berkeley Case*, p. 78; Redesdale Committee, first Report, 402.)

7. If tenure *per baroniam* conferred peerage rights it might be expected that Littleton, who wrote in the time of Henry VI., would make mention of it in his celebrated work on Tenures, but on this, the most important and most interesting of all tenures, if it really conferred on the owner peerage rights, Littleton is silent. (*Berkeley Case*, *supra*, pp. 111, 123; Redesdale Committee, third Report, 69.)

8. In the few early cases in which people sought in the Courts for some kind of relief, on the ground that they did not hold *per baroniam*, or that they did hold *per baroniam*, there is nothing sufficient to establish the existence of a peerage by tenure. (Redesdale Committee, first Report, 396.)

9. There is no evidence that tenure *per baroniam* conferred the right to be summoned to Parliament. (*Berkeley Case*, 128, 131.) For, even assuming that the Majores Barones in the charter of John were the tenants who held *per baroniam* and no others, the subsequent course of summoning to Parliament shows that they cannot be treated as having been entitled, after the Model Parliament in 1295, to be summoned to Parliament. If they had any prior right it was, in some way, abandoned. (Lord Chelmsford, in the *Berkeley Case*, *ibid.* 130—2.)

10. It is needless to inquire what was the position of a baron anterior to the constitution of Parliament in 1295. As to a baron's position subsequently to that date, there is no evidence of any one coming to sit in Parliament except by virtue of a writ of summons from the Crown, or of an oral invitation in full Parliament to sit. (*Berkeley Case*, 132.)

11. Even if in early days there were such dignities as baronies by tenure, there is no sufficient evidence to show that, by transfer of the land, peerage rights were effectually carried to the transferee; and even in those cases, where it is shown that the transferee was summoned, there is nothing to prove that the summons to him was not, in effect, a new creation and favour, not a concession of a right. (*Berkeley Case*, 135, 136.)

12. It is incredible that, as contended in the *Berkeley Case*, a peer could, by his will, deprive his legitimate issue or heirs of his peerage by settling his landed property, with remainders over, on a succession of strangers.

13. If there were such dignities as baronies by tenure in early times, they have long become obsolete, and the decision in the *Fitzwalter Case* (*supra*, p. 182) was in strict accordance with the law. (*Berkeley Case*; Redesdale Committee, third Report, 61.)

14. If there were such dignities as baronies by tenure, they were effectually extinguished by the statute 12 Car. II. c. 24, abolishing tenures. To treat them as preserved by the saving clause to that statute would be inconsistent with the whole principle of the Act. (Redesdale Committee, first Report, 402.)

15. There is no evidence that when that statute was passed peerage by tenure could be transferred, and the statute was not intended to facilitate transfers. (*Berkeley Case*, *supra*, at p. 81.)

16. The Committee have not discovered any charter, grant, or inquisition which imports a reservation of the service of attending the King's Council, or his general Council or Parliament. (Redesdale Committee, third Report, p. 62.)

17. If peerage by tenure really existed in early England, it is hardly credible that questions as to the rights of parties on an alienation would not have been raised and decided in the House of Lords; as, for example, whether, where the land was transferred, the peerage passed out of the possession of the transferor and vested in the transferee, yet no such case is to be found.

18. Even where, as in the *Berkeley Case*, there has been some semblance of a transfer by way of settlement in tail, there is nothing to show that the transferee, when summoned to Parliament, was not summoned as a baron by writ.

19. The Act of Charles II. would, in effect, convert baronies by tenure (if any) into baronies by writ. (*Berkeley Case*.)

20. If barony by tenure originated in the grant of lands to be holden by the service of attending the King's Court, how is it that there is not to be found a single case of a grant of land containing a reservation of such service; and that in the innumerable cases in which there have been inquisitions, on the death of tenants of the Crown, in which the jury have returned the nature of the service by which the land was held, they have never returned, so far as is known, this service as one of the terms on which the land was held?

21. From the time of Henry III. down to the time of King James I. —a period of 400 years—no instance of a claim to a barony by tenure is to be found, except the very peculiar cases of Arundel and De Lisle.

Peerages by tenure no longer exist, *seem*, and no future establishment of title thereto likely.

Looking at the cumulative weight of all these arguments, at the decision in the *Fitzwalter Case*, and the still more conclusive decision in the *Berkeley Case*, it may now be taken as settled that, if there ever were, there are now no longer any peerages by tenure in England; nor is there the smallest likelihood that the title to a peerage by tenure will at any time hereafter be established.

CHAPTER XVII.

ATTAINDER.

BEFORE dealing with attainder and its consequences in relation to peerages it will be helpful to examine the subject of attainder as affecting lands and tenements generally, for it will be found, as might be expected, that there is a close correspondence between the two. Attainder as regards land, &c.

1. What, then, is meant by the terms "attainder" and "attainted"? Meaning of term.

They were descriptive, it seems, of the condition of a man against whom judgment of death had been pronounced after a trial for treason or felony.

"On a judgment of death," says Blackstone, Part I., p. 374, "and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And, therefore, either upon judgment of outlawry or of death for treason or felony a man shall be said to be attainted."

2. What were the consequences of attainder at common law, that is, before the Statute De Donis? Effect of attainder.

(1.) On attainder for treason a man forfeited to the King all his property, including lands and tenements, whether held in fee simple absolute or fee simple conditional (tail). Forfeiture.

(2.) On attainder for felony, lands and tenements of the offender are held immediately of the King, but if the King was not the immediate lord of the fee the lands and tenements escheated to the lord of whom the same were held, subject to the King's prerogative right to hold the lands of the offender for a year and a day, and to commit waste. Escheat.

(3.) Attainder caused corruption of blood. This meant that the attainted person after attainder could not inherit, nor could any person inherit from or through him, "for by his attainder of treason or felony his blood is so stained and corrupted as, first, his children cannot be heirs to him, nor can any other ancestor." (Coke's Inst. 1, 291 b.) Corruption of blood.

"There is yet," says Blackstone, Book 2, p. 254, "a further consequence of corruption and extinction of hereditary blood, which is this: That the person attainted shall not only be incapable himself of

inheriting or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity in all cases in which they are obliged to derive their title through him from any remote ancestor. The channel which conveyed the hereditary blood from his ancestors to him is not only exhausted for the present, but totally dammed up and rendered impervious for the future. . . . This corruption of blood cannot be absolutely removed but by the authority of Parliament." Nevertheless attainder of a person was not equivalent to his death without issue. The inheritance did not descend as if such person and his issue were non-existent. Thus if A., seised in fee simple, had issue two sons, B. and C., and B. was attainted in the lifetime of A. and left issue, C. could not inherit from A. C. was not entitled to say "I am heir. B. and his issue must be ignored."

This law applied as well to an estate in fee simple absolute—to A. and his heirs—as to an estate limited in tail (otherwise described as an estate in fee simple conditional)—as to A. and the heirs of his body or to A. and the heirs of his body by B. his wife—with or without remainders over (see *supra*, p. 80); for the judges had held that a gift in tail—*e.g.*, to A. and the heirs of his body—was in some sense a fee simple conditional, and that on the birth of an inheritable issue the condition was fulfilled so far as to enable the donee to alien or forfeit the property.

This was, no doubt, a somewhat forced and unnatural construction to place on a gift in tail, and it was regarded as in effect defeating or disappointing the intentions of the donor. To remedy this grievance the Legislature passed in 1285 the Statute De Donis Conditionalibus, 13 Edw. I. c. 1.

The Statute
"De Donis."

That statute says: "First concerning tenements that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife and to the heirs begotten of the bodies of the same man and his wife . . . in case, also, where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs that their will being expressed in the gift was not heretofore nor yet is observed [the statute then refers to the fact that after issue begotten there was power to alien, &c.], wherefore our lord the King, perceiving how necessary and expedient it should be to provide a remedy in the afore-said cases, hath ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but it shall remain unto the issue of them to whom it was given after their death, &c." [The Act then provides a special remedy by writ of formedon for the issue, and it is provided that the Act is not to be

retrospective, and fines thereafter levied of entailed lands are made void.]

The statute in effect declared that the judicial construction placed on gifts in tail had defeated the intention of the givers, and it overruled that construction for the future and disallowed alienation to the disherison of the issue in tail. In so enacting, what the Act more especially pointed to was alienation in the ordinary sense of the word—that it prohibited; but by subsequent decisions of the Courts, it was held that alienation by attainder was within the meaning of the statute and covered by its words. There was nothing unreasonable in this construction, because the attainder which caused loss to a man of lands and tenements was due to his own wilful act in committing treason or felony.

At what time it was first held that attainder was an alienation within the Statute De Donis, and that the statute protected entailed lands from forfeiture by high treason, is not clear. The Redesdale Committee say they “have not discovered when it was.” But it is certain that it was so decided at a very early period, for in a case in the Year Book (7 Edw. III. 79—80) it was asserted by counsel and not denied that it had been adjudged in Parliament that the issue in tail could not forfeit; and the law as so decided remained in force for centuries.

An early case in which the statute was relied on as protecting entailed lands from forfeiture was probably that relating to the lands of Piers Gaveston. This unpopular favourite had been executed without any regular form of trial in the time of Edward II. (1312). Later on his widow married Hugh de Audeley, and they in 12 Edw. II. (1319) petitioned that she might have livery of the lands granted to Piers Gaveston and herself in tail, relying for their claim to relief on the Statute De Donis; but the petition was answered by an Act of Parliament specially passed to meet the difficulty whereby all gifts to Gaveston and his wife were annulled. (Rot. Parl. I. 453.)

The case of the Earl of Kent, in 1406 (7 Hen. IV., Year Book, Michaelmas Term, 19), shows that it was then well settled that entailed lands were protected from forfeiture for treason by the Statute De Donis, and not only was the statute held to protect entailed lands from loss by attainder, but it saved them from the doctrine of corruption of blood.

Thus, Littleton, 747, after stating that where a man is attainted his blood is corrupted, proceeds in these words: “But the issue in tail as to tenements tailed is not in such case barred, because it is inheritable by force of the statute and not by force of the common law, and therefore such attainder of his father or of his ancestor in tail shall not put him out of his right by force of the tail.”

How the law stood after the statute was passed until 1535.

From and after the passing of the Statute De Donis, 13 Edw. I. c. 1 (1285), the law therefore stood thus:—

(1.) In the case of an estate tail vested in a person attainted of treason he only forfeited to the King the land for his life. After his death the land descended in accordance with the entail, and there was no corruption of blood so far as the entailed property was concerned.

(2.) In the case of an estate tail vested in a person attainted of felony the land escheated to the lord for the life only of the person attainted. On his death it descended in accordance with the entail.

(3.) In other respects the law remained as before the statute.

Law till 26 Hen. VIII.

The law as thus stated continued for many years in force, from 13 Edw. I. (1285) until the twenty-sixth year of Henry VIII. (1535), on which date estates in tail were by Act of Parliament made forfeitable for attainder for high treason.

26 Hen. VIII. c. 13.
Forfeiture of any estate of inheritance for high treason.

By this Act it was declared that every person convicted of high treason shall lose and forfeit such lands, tenements, and hereditaments which any such offender or offenders shall have of *any estate of inheritance* in use or in possession by any right, title, or connection at any time of any such treason committed, or at any time after, save to every person other than the offenders in any treason, their heirs and successors of such rights, titles, &c., which they shall have on the day of the committing such treason, or any time after.

And it was held that these general words of the Act made all estates in land, including estates tail, forfeitable for treason. The Act, however, dealt with treason only. Estates tail still remained protected by the Statute De Donis from loss by attainder for felony.

Statute of Treasons (25 Edw. III. c. 2).

Next in historical order came the Statute of Treasons—"that blessed statute," as Lord Coke calls it, 25 Edw. III. c. 2; see Instit. 3, chap. 1—declaring and supplementing the law as to treason, and concluding with the words, "and on such treason the forfeiture of the escheats pertaineth to our lord the King, as well of the lands and tenements holden of others and of themselves."

Abolition of forfeiture for treason and felony (33 & 34 Vict. c. 23).

And finally we arrive at 33 & 34 Vict. c. 23 (1869), intituled an Act to abolish forfeitures for treason and felony, and to otherwise amend the law relating thereto, 4th July, 1870, which runs as follows:—

"Whereas it is expedient to abolish the forfeiture of lands, including tenements and hereditaments as provided by 13 & 14 Vict. c. 22, and goods for treason and felony, and to otherwise amend the law relating thereto.

"Be it enacted, &c.:

"1. From and after the passing of this Act no confession, verdict, inquest, conviction or judgment of or for any treason, or felony, or *felo*

de se shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry."

Then follow various provisions as to disqualification and as to the administration of property, &c., and then in sect. 31, modifying the judgment in treason cases, so as to abolish drawing on a hurdle and quartering.

And by sect. 33 it is provided that nothing in the Act shall be deemed to alter or in any wise affect the law relating to felony in England, Wales, or Ireland, except as herein is expressly enacted. The Act is not to apply to Scotland.

Reverting now to peerages, it is common ground that before the Statute De Donis peerages, like land, were liable to forfeiture or loss by attainder. The real controversy is whether they were protected, and if so, to what extent, by the Statute De Donis. Did the Statute De Donis protect peerages?

Now, the view that a peerage, if granted in tail, might be protected from forfeiture by the Statute De Donis was evidently current in the reign of Richard II.; for in the charter, or rather Act of Parliament, of 16 Rich. II. (1393), R. C. V. 109, relating to the restoration of the Earldom of Oxford to Aubrey de Vere, it is recited that he has not, so far, been able to produce evidence that the peerage was entailed: "Et en outre combien que le dit Aubrey nad riens monstre uncore en especial que les noun et estat du Count d'Oxenford sont a luy taillez"; evidently implying that the earldom was a thing capable of being entailed within the Statute De Donis. Earldom of Oxford.

Then, in the great controversy between the Earl Marshal and the Earl of Warwick as to their precedence (3 Hen. VI. (1424), R. C. V. 210), the Earl Marshal claims to be Duke of Norfolk, and to have the style and title accordingly, and that "I may by your sovereign lord my said worthy lord your uncle and all your other lords be so reputed held and declared in this your Royal Court and have and enjoy my place thereto accordant saving always the title right and possession of me and my heirs of my body coming as Earls of Norfolk to my place in this High Court above my said cousin of Warwick and his heirs because the name of Duke of Norfolk is *tailed* to me and to my heirs males of my body coming and the name of Earl of Norfolk is *tailed* to me and to my heirs of my body coming generally." Norfolk and Warwick Claims.

And again, in 36 Hen. VI. (R. C. V. 319), the King, in letters addressed to the sheriff of Somerset, recites that "Edmund lately Duke of Somerset dead held on the day of his death in his demesne as of fee tail to himself and the heirs male of his body the style title name and honour of Earl of Somerset by the gift and grant of the Lord Henry lately King of England Fourth after the Conquest and by his letters patent to John lately Earl of Somerset The Somerset entail.

father of the said Edmund lately Duke of Somerset and the heirs male of the body of the same John who was heir male to the said Edmund six-and-twenty pounds per annum."

The Nevil Case. Finally, in *Nevil's Case* (2 Jas. I.), we have the precise point raised. Coke (7 Rep. 33), referring to this case, states that it was, by the King's command, propounded to all the judges of England, and that three questions were moved. First, whether a limitation of the dignity of Earl of Westmoreland, granted by letters patent of 21 Rich. II. to Ralph Nevil, Lord Raby, and the heirs male of his body, was within the Statute De Donis or a fee simple conditional at the common law; secondly, admitting that it was an estate tail within that statute, whether, by attainder of treason, the estate tail was forfeited by a condition of law tacitly annexed to the estate of the dignity; thirdly, whether the estate of the dignity was forfeited by the Act of 26 Hen. VIII. c. 13.

The report then states that it was resolved by all the judges of England that a name of dignity might be entailed within the said Act; for, in the case at bar, it doth concern land, for he was made Earl of Westmoreland, who by the common law is a great conservator of the peace . . . and therefore such office of dignity of any place doth concern land, and therefore may be entailed within the said statute.

Third Report,
p. 43.

The judges, it will be observed, seemed to have relied on the fact that the earldom in this case, being named as of the place, was thereby constituted a tenement within the Statute De Donis; but, *semble*, this accidental circumstance is not to be taken to form the true ground of the decision. The judges are credited with having based their opinion on the sounder and more rational view that all peerages savour of land. (See *supra*, p. 5.)

The following is a case referred to in *Nevil's Case* as an illustration of the operation of the Statute De Donis in protecting an entailed peerage from forfeiture:—

Earldom of
Northumber-
land.

The Earldom of Northumberland was limited, in 1557, to Thomas Percy in tail male, with remainder to his brother, Henry Percy, in tail male. Thomas was attainted and beheaded in 1571, and died without issue male, and Henry thereupon became Earl of Northumberland, and in 18 Eliz. (1576) was summoned to Parliament accordingly.

*The Purbeck
Case, 1660.*

In the *Purbeck Case* (Collins' Claims, 293) Lord Chancellor Nottingham (differing from Lord Shaftesbury, *supra*, p. 157) deals with the subject as follows:—

"As to the objection that an honour is not within the Statute De Donis, nothing is got by it if true, for, if not, it remains a fee simple conditional, and a surrender by fine works more strongly upon a fee simple conditional. But, on the other side, there is very much

lost by it, and the peers are all undone if the objection be true and that honours cannot be entailed, for then no remainder can be limited of an honour after an estate tail, and this may concern and degrade many of your Lordships. But that which concerns all of you is that then all honours will be forfeitable for felony, as appears by *Lord Audley's Case*, who, being a baron in fee simple, was attainted of felony, and, though his son, by a patent of restitution, did long usurp the old precedence, yet that being now looked into, the son was fain this session to be restored by Act of Parliament, whereas all entailed honours, notwithstanding any corruption of blood, are preserved by the Statute of Westminster (2) against all forfeitures for felony, though not against treason. So that no small privilege is lost if an honour cannot be entailed within the Statute of Westminster (2)."

The above extract is taken from Cruise (p. 124), who there states that he was indebted to Mr. R. H. Eden for the note of Lord Nottingham's speech. This statement is confirmed by the argument or advice of Chief Baron Parker in the *Ferrers Case* (2 Eden, 381).

Next in importance to *Nevill's Case* as an authority on the question comes the *Athol Case* in 1764.

The Dukedom of Athol had been granted by letters patent in 1703 to John, Marquis of Athol, in tail male. He died in 1725, leaving an eldest son, James, who succeeded to the title, and died without issue, and a second son, George. George was, in 1745, attainted of high treason by Act of Parliament, and died 1760, leaving a son, John Murray. This John, in 1764, claimed the peerage by petition addressed to the King, and the petition referred to opinions in his favour given by several eminent lawyers, which he had obtained in the lifetime of his uncle. These opinions were by Mr. Charles Yorke, Sir Fletcher Norton, and Mr. De Grey, and are set out in Cruise, at p. 128 *et seq.* They were all to the effect that the rule of forfeiture and corruption of blood was by statute of 7 Anne, c. 21, s. 3, the same in Scotland as in England; that the dignity being granted in tail, the eldest son of George Murray would be entitled to succeed to the dukedom on the death of James, the title being protected by the Statute De Donis as an entailed dignity, and there being no corruption of blood in the descent of entailed dignities.

The Athol
dukedom.

The petition having been referred to the House of Lords, it was resolved, after hearing counsel and examining witnesses, that the petitioner had a right to the titles, honours, and dignities claimed by the petitioner.

Lords'
Journals,
Vol. XXX.
pp. 466, 469.
7 Anne, c. 21
(Scotland).

The Act of Anne, c. 21, s. 3, on which this decision was based, provides that all persons convicted or attainted of high treason in Scotland shall be subject and liable to the same corruption of blood, pains, penalties and forfeitures as persons convicted or attainted of high treason or misprision of treason in England. The House of

Lords had, therefore, in determining the case, to ascertain what was the law of England in regard to the forfeiture of an entailed dignity, and then to apply the law as so ascertained to the case of a Scotch peerage. The decision of the House in the *Athol Case* consequently involved adjudication as to the law of England, and must be taken as affirming the proposition that by that law an entailed dignity was a tenement within the Statute De Donis, and therefore that there was no corruption of blood *qua* the dignity, and nothing to disentitle the eldest son of the attainted George Murray to succeed to the dukedom *per formam doni*.

Rex v. Knowles
(Earldom of
Banbury).

A passage from Lord Holt's judgment in the proceedings against Charles Knowles (*Rex v. Knowles*, alias *Earl of Banbury*, 12 State Trials, pp. 1167, 1692; Skinner, 517) ought not to be omitted. There, speaking with reference to the creation of the peerage by patent, the Chief Justice says: "And by such a creation, that is by patent, an honour may be entailed within the Statute of Westminster II. (Statute De Donis), and the descent of it is to be governed according to the rules of the common law, and it is resolved to be a hereditament forfeitable for treason within 26 Hen. VIII. (*Neville's Case*), and therefore the defendant, being by his plea entitled himself to an estate tail in this honour under the letters patent to Viscount Wallingford and the heirs male of his body, as a lineal descendant under that entail, held a freehold and inheritance in that honour vested in him by common law to be protected as and good according to the rules of law."

The Stourton
Case.
R. C. 4th Rep.
406.

The *Stourton Case* is also one of importance. The Barony of Stourton was granted in tail male in 26 Hen. VI. It descended to Charles, who was attainted of felony and executed in 1557. In 1575, John, son and heir of the attainted peer, was summoned to Parliament as entitled to his father's peerage, and took his seat accordingly. Afterwards a Bill for his restoration in blood was introduced, but lost. Here there appears to be a clear case in which a peerage was held to be protected by the Statute De Donis from forfeiture for felony. The son succeeded because there was no corruption of blood affecting the entailed dignity by reason of the father's attainder. This is the only possible explanation of the son's succession, and it is the explanation which Parker, C. B., adopted in dealing with the *Ferrers Case*. (See *infra*, p. 196.)

The Somerset
Case (1).
2 Eden, 379.

As to the *Somerset Case*. In 5 Edw. VI. (1551), the Duke of Somerset, also Earl of Hertford, Viscount Beauchamp, and Baron Seymour, was indicted and attainted of felony by his peers and executed. (Howell's State Trials, I. 509.) The peerages were all limited in tail male or tail special. By Act of Parliament (5 & 6 Edw. VI.), it was enacted that the Duke of Somerset and his heirs male begotten upon the body of the said Lady Anne, his then wife, for ever should forfeit

to the King and be deprived from thenceforth for ever, as well of the name of Viscount Beauchamp, Earl of Hertford, and Duke of Somerset, and every of them as of all other his and their honours, degrees and dignities. If attainder of felony forfeited entailed peerages, there was no occasion for this Act. The Legislature therefore proceeded on the view that entailed peerages were not lost by felony, and that an Act was therefore necessary.

The Dukedom of Somerset above referred to affords another illustration. The title is granted in 1547 to the duke and the heirs male of his body by Anne, his second wife, with remainder, failing such heirs male, to Sir Edward Seymour, by Katherine, his first wife, in tail male. The duke, as above mentioned, was attainted and his dignities forfeited in 1552 by the Act of 5 & 6 Edw. VI. above mentioned, but this attainder and forfeiture did not destroy or affect the remainder over. That was protected by the Statute De Donis, and when in 1750 the issue of the duke by Anne, his wife, failed, Sir Edward Seymour, his heir by his first wife, succeeded. This succession was, there can be little doubt, by virtue of the Statute De Donis protecting the remainder from forfeiture, but the Redesdale Committee insist that the remainder was not protected by the statute, but took effect because it was a grant of a separate and distinct peerage. (See further, *supra*, p. 83.)

The Somerset Case (2).
2 Eden, 380.

In 1711 Henry St. John was created Viscount Bolingbroke in tail male. He was attainted of high treason in 1714, restored in blood only in 1725, and died without issue in 1751. The patent creating the peerage contained a remainder in tail male to Henry, the father of the grantee in tail male. Henry, the father, who was created Viscount St. John, with remainder to his issue by his second wife, died in the lifetime of Henry St. John above mentioned, and left John, a son by his second wife. On the death then of the attainted peer, the Viscountcy of Bolingbroke descended to this John, and afterwards to his son and heir, Frederick. He was summoned by writ in Parliament accordingly. The remainder was, no doubt, protected by the Statute De Donis.

The Bolingbroke Case.
R. C. 3rd Rep.
58, 60.

Laurence, Earl Ferrers, was in 1760 attainted of felony and murder by his peers in full Parliament—Lord Keeper Henley presiding as Lord High Steward—and was executed at Tyburn, dying without issue. At the time of his attainder he was entitled to the Earldom of Ferrers, created by letters patent 3rd September, 1712 (10 Anne), whereby his ancestor was created Viscount Tamworth and Earl Ferrers in tail male. On the attainder of Earl Laurence, the question arose whether the earldom and viscountcy were forfeited or passed to his next brother, Washington Shirley. The question was submitted to the Lord Chief Baron Parker, and his opinion on the question is set

The Ferrers peerage.
Supra, p. 148.

out at p. 373 *et seq.* of Mr. Eden's Reports, Vol. 2. After referring to the circumstances and to early cases of entails, the learned baron said: "As Laurence, Earl Ferrers, succeeded to and enjoyed the earldom and viscountship several years, I think that there can be no doubt but that the corruption of his blood by attainder would impede the descent of those honours to Washington Shirley, his next brother, unless the Statute of Westminster II. c. 1, will preserve that on forfeiture." He then refers to the wording of the Statute De Donis, and says: "Having stated the words of the statute, let us see what the sense and practice of the legislature have been where a peer entitled either to a fee simple or an entailed honour has been attainted of felony." He then deals with the *Dacre Case*, and expresses the opinion that as the barony there was in fee simple, it was lost by the attainder of Lord Dacre in 33 Hen. VIII., and that this it was which necessitated the Act of 1 Eliz. c. 37. The barony in the *Stourton Case*, he points out, was an entailed peerage, and that the next heir succeeded, notwithstanding the attainder of his father of felony. And after referring to and commenting on the other cases above mentioned, he concludes thus:—

"Upon the whole, whatever might have been thought of this matter if it had been quite new, yet, after what has passed in Parliament and elsewhere on occasion of the attainders of Lords Dacre and Stourton and the Duke of Somerset of felony, and after the opinion of the judges in *Nevil's Case*, and the passages out of Lord Coke's works which have been cited, I must take it to be settled law that where nobility has been conferred and limited by the King's patent in tail from any place, it would be an estate tail within the protection of the Statute De Donis, and, consequently, the viscountship in the present case, being from a place, will not be forfeited by Earl Ferrers' attainder of felony.

"And with all due deference to better judgment, I apprehend that, though the earldom in the present case is not conferred by the patent from any place, yet it ought to have the protection of the Statute De Donis in the same manner as if some place had been expressed in the patent, and will no more be forfeited than the viscountship; otherwise this absurdity will plainly follow, that where two honours are conferred and limited in tail by one and the same patent, the one from a place and the other not, that which is from a place would be an estate tail within the protection of the Statute De Donis, and would not be forfeited by an attainder of felony, but that which is not from any place would be only a fee simple conditional, and would be forfeited by an attainder of felony.

"And I beg leave to repeat Lord Nottingham's opinion that all entailed honours are within the protection of the Statute De Donis,

and consequently, whether they are from a place or not, they are not forfeited by an attainder of felony."

The Report further states that the Lord Keeper was so well satisfied that the attainder of Laurence, Earl of Ferrers, of felony and murder did not affect his next brother Washington Shirley's right to the earldom, &c., that his Lordship granted him his writ, and the rest of the Lords concurred in opinion with the Lord Keeper, or, at any rate, acquiesced in it, for he took the oath and his seat in Parliament as Earl Ferrers on Monday, 19th May, 1760. So that this point is now settled by the highest authority.

But the protection given by the Statute De Donis to estates tail did not extend to peerages in fee, which were still forfeitable by attainder of the holder. This is illustrated in a series of cases, and amongst them the following :—

Protection of statute not extended to peerages in fee.

1. The claim of Walter Ogilvie to the Earldom of Airlie, a Scotch peerage, in 1812. The peerage in this case was created in 1639, and was limited to the original grantee and his heirs male, who succeeded him in his patrimony and estate. The earldom descended to David, Earl of Airlie, who had two sons, James and John. James was attainted of high treason in 1715, and survived his father. He died without issue in 1730. John left two sons—David, who was attainted of treason in 1746, and Walter, the claimant. Thus in both lines the heir had been attainted of treason in the lifetime of his ancestor. It was contended on behalf of the claimant that the Statute De Donis protected the dignity, and that it was only forfeited under the statute of Henry VIII. c. 13, during the life of the party attainted and the survival of his issue. On this point the judges were consulted by a hypothetical case relating to land, and they were of opinion that the attainder of the son in each case in effect destroyed the peerage, and the House of Lords accordingly resolved against the claim.

The Earldom of Airlie. Cruise, 131.

2. The Lumley barony is another instance. This barony was created by writ, and descended to John, Lord Lumley. John's son, George Lumley, was attainted in 1538 (29 Hen. VIII.), and left John, his son and heir. Nine years later (1547) an Act of 1 Edw. VI. was passed, on the petition of John, the son of George, restoring the petitioner to the title in tail male, and in blood only, and it was held that the old title was not restored for all purposes by the Act, but only on the terms that it should descend in tail male. This is an express authority to show that the attainder of the heir apparent of a peer holding a barony by writ operates, if such heir survives his ancestor, to extinguish the peerage.

The Lumley peerage. R. C. 4th Rep. 286. Collins, Claims, 373.

3. *The Dacre Case* (fourth Report, 324) is another example :—

In 1541 (33 Hen. VIII.) Thomas Fienes, Lord Dacre, who held an ancient barony by writ, was attainted of murder. He left two sons—

The Dacre barony. Collins, Claims, 24.

R.C. 3rd Rep. 216. Thomas, who died without issue, and Gregory, who, by Act of Parliament, 1558 (1 Eliz.), was restored in blood, honour, and dignity. Gregory died without issue in 1594 (36 Eliz.), leaving his sister Margaret his heir. Margaret married Samson Leonard, and was, in 1605 (2 James I.), declared entitled to the barony. This makes it clear that attainder for murder in the case of a barony by writ caused corruption of the blood, for otherwise the Act of restoration would have been unnecessary.

The Act in question (1 Eliz.) after reciting that by reason of the attainder of felony of Thomas, Gregory was in blood, honour, degree, and dignity corrupted, declared that Gregory was by the Act restored in blood, lineage, honour, and dignity as son and heir of the said Sir Thomas Fienes, Lord Dacre, and Gregory was accordingly summoned to Parliament in 5 Eliz. (1563), and continued to be for many years afterwards until his death in 1594.

The Audeley barony.
B.C. 4th Rep. 315.

4. In the *Audeley Case*, Mervyn Touchet was attainted of felony in 1631. The barony was by writ—commonly called a barony in fee—and was therefore not protected by the Statute De Donis. The attainted peer left three sons. In 1634, Charles I. by patent purported to grant and restore to James, the eldest son of the deceased peer, and his heirs the dignity of Baron Audeley of Hely, and the Journals of the House state that because he came in upon restitution his patent was thought fit to be read. He frequently sat after that date, and was placed next to Lord Mowbray. In 1678 an Act was passed to the effect that James, Baron Audeley of Hely, and the heirs of his body, and after them Mervyn Touchet, third son of Mervyn, Lord Audeley, the attainted peer and the heirs of his body, and after him the daughters of Mervyn, the attainted peer, might hold, and were thereby restored to the dignity as fully as if George Touchet, second son of Mervyn, Lord Audeley, were dead without issue. And it was further enacted “that the said letters patent whereby the said honour was intended to be restored should not be taken or expounded or have any other force for the time to come than to enable the persons above intended to be hereby restored to enjoy the said barony according to the true intent and meaning of this Act.”

The obvious implications here are that a barony by writ, not being protected by the Statute De Donis, was lost by attainder of felony, that the Crown could not of its own power effectually restore the barony, but that an Act was required for the purpose.

The conclusions to be drawn from the foregoing Acts and authorities may be formulated as follows:—

1. That after the Statute De Donis (*supra*, p. 188)—

(a) A peerage in fee simple, including a barony by writ, still remained liable to forfeiture or loss if the holder was

Conclusions from above Acts, &c. as to forfeiture.

attainted of treason or felony. Such a peerage also remained liable to loss when, on the death of the holder, the next heir was under attainder.

- (b) An entailed peerage remained liable to forfeiture, notwithstanding the Statute De Donis, if the holder was attainted of treason. Such a peerage might also be lost if, on the death of the holder, the next heir was under attainder for treason.
- (c) The statute so far protected an entailed peerage that on the attainder of the holder of felony the peerage was only lost for the life of the offender. On his death it passed to the issue in tail unaffected by any corruption of blood.
- (d) That in the case of a peerage entailed with remainders over the statute saved such remainders from being destroyed by the attainder of the holder under the prior limitations.

2. That after the statute of Henry VIII. c. 26, all peerages, whether in fee or in tail, were forfeited or lost by attainder of treason.

There is nothing in these conclusions at variance with good sense and justice. They merely come to this: that the Statute De Donis was applied to a limited extent to the relief of entailed peerages from forfeiture and corruption of blood, but not so far as to protect them against failure by the holder for the gravest of all crimes—treason.

Contentions of the Redesdale Committee.

The Redesdale Committee has, however, taken extraordinary pains to controvert some of the above propositions, and to show—

1. That the Statute De Donis does not and never had any application to peerages at all, whether in fee simple by writ or in tail.

2. That all peerages, whether in fee simple, by writ, or in tail, have always, whether before or after the statute, been forfeited or lost by attainder, whether of treason or of felony; and

3. That this being so, the decisions by which the Statute De Donis has been held to give a qualified protection to peerages have all been incorrect.

Perhaps the first comment is that the subject is hardly worth the pains expended upon it by the Committee.

Attainder of a peer for felony has been a very rare occurrence in our history. In the course of 600 years there have probably been not more than a score of cases, nor is there reason to expect that they will become more numerous in the future.

Nevil's Case (*supra*, p. 192), as the chief stronghold of the opposite view, is the main point of attack. The Committee hint a doubt, first,

Contentions
of the
Redesdale
Committee
against some
of above
conclusions.

whether the case was not a mythical one. Thus at p. 44, third Report, they say:—

“As the Committee have been unable to discover what was the nature of the proceeding in which reference was made by the King to the judges, or any document relating to the subject except this Report, and the notice of it taken as after-mentioned, they are not able to state what were the terms of the report made to the King on the subject. . . . Much of the matter contained in Sir Edward Coke’s printed report may have proceeded only from Sir Edward Coke himself.”

From this passage it is clear that the Committee cannot have extended their researches very far,* for on referring to the Calendar of Domestic State Papers of the period, it appears that they include Nevil’s petition, and the substance of the petition is set out in Surtees’ “History of Durham.”

Passing from the suggestion that the case was mythical, the Committee next raised doubts whether in *Nevil’s Case* the point whether a dignity could be a tenement within the Statute De Donis was ever discussed—in other words, whether the Report is or is not an untrustworthy one.

“There seems,” they say, “strong ground for supposing that the suggestion that a dignity was a tenement within the intent and meaning of the Statute De Donis Conditionalibus originated wholly with Sir Edward Coke.” (Fourth Report, 312.)

“The answer,” says the Committee’s third Report (p. 44), “given by the judges to the King, therefore, may have been simply that the dignity was forfeited by the attainder, and that Edward Nevil, the claimant, supposing him to have been the heir male of the body of Ralph Nevil, created earl in the 21 Rich. II., had, therefore, no right to the dignity. For this purpose it was not necessary to determine whether the dignity was a tenement within the Statute De Donis or not, if the judges were of opinion that the dignity was forfeited independently of the effect of the statute of 26 Hen. VIII.”

The fourth Report (p. 258) takes up the same line. “Sir Edward Coke,” says the Committee, “represents the judges as having conceived that the dignity was so forfeited by reason of a condition tacitly annexed to the grant of a dignity, and he further represents the judges as having conceived that though the dignity was created by patent . . . it was a tenement within the meaning of the Statute De Donis Conditionalibus, because it had relation to land. . . . It seems, therefore, highly improbable that they should have resolved (with a

* In like manner the Committee seek to treat the *Abergavenny Case*, reported in 12 Co. Rep., as an invention of Sir Edward Coke; but the facts brought to light by Sir Harris Nicholas in his report of the *Lisle Peccage Case* afford cogent evidence to show that there is no ground for such a reflection on Lord Coke’s credibility.

view to no conclusion in the particular case before them) that a dignity was a tenement within the meaning of that statute, and if credit may be given to Whitlock that question was not argued before the judges."

Again, in their third Report, p. 44, the Committee, referring to *Nevil's Case*, say: "The same report [of *Nevil's Case*] appears also to have been the subject of animadversion in a reading of James Whitlock in the Middle Temple, in 1619, of which there is a copy in the Hargrave Collection in the British Museum; Whitlock strenuously contending that titles of honour are not within the Statute De Donis, denying the assertion of Sir Edward Coke that the matter was argued in *Nevil's Case* before it was resolved, and declaring to his knowledge the contrary was the fact." *

Whitlock, it will be observed, does not deny that the case was considered and resolved on by the judges, or that the conclusions arrived at were arrived at in the manner stated. All he says is that the counsel appointed to argue were not in fact heard. Of the two hypotheses it certainly seems the more probable that the report was a correct report, even if the reasons given by the judges were not in all respects sound, than that Coke, for no conceivable object, should have falsely reported.

The Committee then go on to argue that the view that a peerage was a "tenement" within the statute was unsound. They admit, as we have seen (p. 6), that a peerage is a tenement; that is, "a tenement in gross dependent on nothing but the terms of the patent by which it was created" (third Report, p. 222), but they will not allow that it can be a tenement within the Statute De Donis.

Thus, in their third Report (at p. 44), the Committee say: "On referring to the Statute De Donis itself, the language used seems inapplicable to a mere dignity inherent in the blood of the grantee." And again, at p. 45: "It cannot be contended, and in *Nevil's Case*, as reported by Sir Edward Coke, it does not appear to have been contended, that the mischiefs recited in the statute, and which it was proposed by the statute to remedy, were mischiefs which could exist in the case of a mere dignity granted by the King to a man and the heirs general of his body, or to special heirs of his body, which dignity could not in any manner be aliened by the grantee, but must cease on failure of the heirs specified in the grant."

At p. 44 they have some further remarks on the subject. "The assertion that the dignity of peer of the realm could not be aliened or

* What Whitlock really says (Hargrave MSS. 237, f. 63) is: "In *Nevil's Case* it is urged that upon many reasons there expressed that these personal honours should be within the Statute De Donis, and it is affirmed that the matter was argued before it was resolved. It is not so, for I know them that were appointed to argue it were not called in to it."

granted before or after issue born of the grantee was not controverted in *Nevil's Case*, or rather it was admitted, and if that was the rule of law before the Statute De Donis Conditionalibus as applied to a dignity of the nature of that granted to Ralph Nevil, it is clear that such a dignity was not within the mischief intended to be remedied by the statute, and it does not seem to have been conceived that such a dignity could be so aliened, though it was conceived that it might be surrendered to the Crown."

Analysis of
Committee's
objections.

These objections of the Committee to a peerage being a tenement within the Statute De Donis, resolve themselves, when analysed, into four points. In substance, the Committee say that a peerage cannot be a tenement within the statute:—

1. Because a peerage is a thing of new creation, not like land, having a continuing existence (third Report, 45 *et seq.*). But this is not a sound objection, for there are several kinds of tenements undoubtedly within the statute to which the same objection might be raised, *e.g.*, a rent charge granted to a man and the heirs of his body; an office concerning land granted to a man and the heirs of his body. Both these are new creations, and nevertheless tenements within the statute.

2. Because the object of the statute was to prevent alienation, and a peerage being inalienable, it was not within the mischief of the statute, "the sole object of which was to prevent the effect of alienation" (third Report, p. 50). But this objection also is unsound, for one of the mischiefs sought to be remedied by the statute was the forfeiture or loss of the entailed property by attainder, and a peerage was liable to forfeiture or loss by attainder, nor was the inalienability of a peerage by any means a settled doctrine of law in the time of Edward I., the date of the statute. On the contrary, in 30 Edw. I., Bygod, Earl of Norfolk, purported to surrender his earldom to the King, and for many centuries later it appears to have been thought that there was no objection to such an alienation of a peerage by surrender, whether effected by fine or otherwise.

3. That the writs given by the Statute De Donis to the persons requiring them could not apply to peerages, and therefore the Act could not have been intended to affect peerages. But here again the answer seems to be that the main object of the Act was to secure the observance of the will of the donor,* and that the provision of the new

* The meaning of the statute was considered in *Willion v. Berkley*, 1561 (1 Plowd. 223), 3 Eliz. And Anthony Brown, J., pointed out that "the letter of the Act recites that the alienation was a tort and a wrong, and the intent of the donor was thereby violated and his right taken away . . . so that such alienation after issue had being to the disinheritance of the issues and of the donor, and in violation of the will and intent of the donor, and, as such, tortious and injurious, was a very great mischief, for the full redress whereof this statute was made. And the words

form of writ was merely ancillary and supplemental, and should be treated as applicable only where required.

4. The statute avoids fines thereafter made of tenements in tail, which would seem to import that as regards fines made before the statute there was to be no objection. But on a fair construction the provision would seem applicable only to fines capable by law of being levied.

In the result the Committee fail to dispose of or discredit *Nevil's Case*, and that case must therefore be taken still to express the law.

And here it may be convenient to note how the Lords' Committee deal with the authorities above referred to (other than *Nevil's Case*), which go to confirm the view that a peerage limited in tail enjoys a qualified protection from forfeiture as a tenement within the Statute De Donis.

There is, first, the *Athol Case* (*supra*, p. 193), in which the House of Lords must be taken to have recognized and acted on *Nevil's Case*. As to this important decision the Committee observe a significant silence—significant because it is impossible to suppose that so well-known a case can have escaped such industry as theirs—and the

Writer's view that *Nevil's Case* stands. Dealing of Lords' Committee on authorities except *Nevil's Case*. *The Athol Case*.

which made provision for the same are these, 'that the will of the giver, according to the form of the deed of gift manifestly expressed, from henceforth shall be observed,' which words alone redress the whole grievance, and the other words following . . . are but consequential to the said words of the purview, and are only explanatory, and not of substance but of abundance, which might well enough have been omitted. For if the will of the donor shall be observed, from thence it follows that the alienation of the donee shall not bar the issues. . . ." And Dyer, C. J., in the same case, said: "But (as I take it) it was a fee simple presently before issue, but the having of issue made it more full and perfect than it was before. For after issue he had power to alien, and thereby to bar the issues and the donor, and it should escheat for felony . . . and by other means he might disinherit the issue and the donor, which was contrary to the will of the donor, and was a hard case, as the statute says, and very injurious and unreasonable. And thus the makers of the Act looked upon this permission of the common law, or this common error, whereby they took it that the having power to alien was a full injury, and a thing against reason, and the words after, namely, 'that it is necessary and useful to provide a remedy in the cases aforesaid,' have in them a kind of vehemence purporting great necessity of a reformation. . . . The Act has ordained that the will of the giver, according to the form in the deed of gift manifestly expressed, shall from henceforth be observed. So that the observance of the will of the donor is become the reformation of all that was amiss before, and the will of the donor is the effect of the statute. And from thence it follows that the alienation of the donee shall not bind the issues nor the donor. . . . So that it was superfluous to express this in the Act, for these clauses are but consequential . . . and everything that is contrary to his will is reformed by this Act, as everything that is his will is made a law by this Act, and, therefore, an entail to the heirs male of the body of the donee is within the purview of the Act as it is taken in 18 Edw. III., and in *Carbonnel's Case* in 33 Edw. III. . . . and the three estates limited in the preamble of the Act, that is to say, especial tail, frank marriage, and general tail, are but put there for examples, and not as containing all the entails intended by the statute. And, therefore, the estate of the donee is altered, . . . for before [the statute] the donee should forfeit it for treason, and now, as appears in 7 Hen. IV. (*Earl of Kent's Case*, *supra*, p. 189), he shall not. . . . This statute was made to reform the abuse, and to restore the common law in this point to its right and just course, which it did by restoring to the donor the observance of his intent."

Committee's silence on the subject can therefore only be ascribed to a consciousness on their part that the case is irreconcilable with their theory that an entailed peerage is not within the Statute De Donis.

The Stourton Case.

As to the *Stourton Case* (*supra*, p. 194), the Committee are at a loss to explain how the son came to be summoned, notwithstanding the attainder of the father of felony, and they profess themselves unable to reconcile the case with the *Dacre* (*supra*, p. 197) and *Audeley* (*supra*, p. 198) Cases. The distinction is obvious: those cases (the *Dacre* and *Audeley Cases*) related to baronies by writ, and therefore unentailed. The *Stourton Case* related to an entailed dignity. In their anxiety to avoid the conclusion that in the *Stourton Case* the Statute De Donis was held to apply, the Committee are driven to the improbable conjecture that the writ to the son may have been issued on the understanding that a Bill for his restoration would be forthwith introduced and would pass into law. This is mere guess-work. The Bill for restoration in blood was not presented till the 6th of March, 1575, twenty-four days after the son had taken his seat in the House, and been recognized as entitled to the precedence of his ancestors.

The Bill introduced was for the restoration in blood of John, Lord Stourton, and his brothers and sisters. It was necessary to cure the corruption of their blood, and to render them capable of inheriting lands which might thereafter descend to them or any of them. With this rational explanation at hand, why postulate a mistake—a mistake which is made more improbable by this consideration, that if the son was not summoned as being entitled to the ancient dignity by virtue of the Statute De Donis, the writ to him must have operated as the creation of a new peerage, not descendible like the old peerage in tail male, but descendible to the heirs of his body, as in the case of other baronies by writ? Surely the fair presumption is that the Crown and its advisers knew what they were about, and acted regularly and not irregularly in the matter. The fact that Coke has not used the case for his notes on *Nevil's Case*, on which the Committee lay stress, cannot count for much. He may have overlooked the case.

The Somerset Case.

Nor do the Committee attempt to meet the points made by Chief Baron Parker (*supra*, p. 196) with reference to the *Somerset Case*, namely:—

1. That if the attainder of the duke for felony forfeited his entailed peerage, then there would have been no necessity for the Act 5 & 6 Edw. VI.

2. That the subsequent restoration by 12 Car. II. of his great-grandson as fully as if the Act 5 & 6 Edw. VI. had never been passed, anything in the said Act notwithstanding, without any reversal or even notice of the attainder, implies that the Legislature considered the entailed honour as not affected by the attainder—only by the Act.

Both these points make strongly in favour of the applicability of the Statute De Donis to entailed peerages.

In the *Somerset (Seymour) Case* (*supra*, p. 196) the Committee will not allow that the remainder was protected by the Statute De Donis, and that this was the reason why Sir Edward Seymour succeeded as remainderman. They contend that the remainder was a new and distinct peerage—a theory very difficult to make good (see p. 82); they take up the same position in regard to the *Bolingbroke Case* (*supra*, p. 195), and the *Northumberland Case* (*supra*, p. 192).

*The Somerset
(Seymour)
Case.*

In dealing with the *Ferrers Case* (*supra*, p. 195) the Committee (pp. 54, third Report, and 316, fourth Report) suggest a doubt whether the case of Earl Ferrers was the subject of due consideration when the writ was issued to Washington Ferrers (p. 319); but this suggestion is sufficiently refuted by the elaborate opinion of Chief Baron Parker in the case, and by the Report in Eden, which shows that the Lord Keeper had also considered the matter.

*The Ferrers
Case.*

By way of explaining or justifying the summons to Washington Ferrers the Redesdale Committee say (third Report, p. 54):—

“It may be doubted whether the dignities thus claimed by Washington, Earl Ferrers, were affected by the attainder of Earl Laurence of felony. The effect of that attainder was to corrupt the blood of Earl Laurence, but not that of Earl Washington, who claimed as heir male of the body of his ancestor, the first Earl Ferrers, so created by patent, and not as heir of Earl Laurence; and as it has been said that attainder of felony properly creates no forfeiture of the inheritance of land, but only escheat to the lord, it may be doubted whether the attainder of Earl Laurence could operate to the disadvantage of his brother.”

And again, at p. 318 of the fourth Report, the Committee say that it might have been contended that though the issue of Earl Laurence, if he had had any, would have been persons in blood and lineage corrupted by the attainder of his father, yet that Washington was not in blood and lineage corrupted, and that he might claim the dignity as heir male of the body of the first Earl Ferrers; and that, therefore, the corruption of blood, produced by the attainder of his brother, did not affect his title; that if attainder of felony created no forfeiture of land holden in fee simple, though it might give a title to land so holden by way of escheat, for want of an heir entitled to claim the land, yet the law of escheat was not applicable to the dignity of a peer of the realm which did not lie in tenure.”

But this surely is a most startling proposition, involving as it does the theory that the attainder of a peer for felony only affects the peerage—whether such peerage be one in fee simple or by writ or in tail—during the life of the attainted person and the continuance of his issue: such issue once extinguished, there would be nothing to prevent the other heirs coming in and claiming the title irrespective of the

attainder, for they would be claiming, not through the attainted peer, but through his ancestor the original grantee direct. To admit such a principle would be to ignore the law of escheat, under which attainder of felony causes the escheat of all lands and hereditaments.

Why, then, was a peerage not liable to escheat for felony, unless it was that it was protected by the Statute De Donis? All other inheritances at common law escheated for felony, as the Committee themselves, at p. 255, fourth Report, recognize.*

Why should a peerage be an exception? The dignity of a peerage is an incorporeal hereditament, as the Committee, at p. 265 of their fourth Report, admit.

*Earldom of
Perth Case.*

But the Committee's theory on the subject is shown clearly to be unsound by the decision of the House of Lords in the *Earldom of Perth Case*, reported in 2 H. L. C. 865 (1846). The peerage in that case was limited to the original grantee and his heirs male, and it appeared that James, the fourth earl, held under that limitation. He died in 1716. A year prior to his death—in 1715—his eldest son, James, was attainted. He lived on until 1720. Had he not been attainted the title would, on his father's death, have descended to him; but, by reason of the attainder and corruption of blood, he was incapable of taking by descent. The question then arose whether the peerage was at an end, or whether, after the death of the person attainted and the failure of his issue, the other heirs might claim as from the original grantee. The attainder having taken place after the date of the Treason Act, 1709 (7 Anne, 21), mentioned *supra*, p. 193, it became necessary to decide the case in accordance, as nearly as might be, with the law of England, and the House of Lords decided that the peerage was lost. "It became," said the Lord Chancellor, "as much forfeited as if he, the son, had been a peer at the time of his attainder. The first case of the Airlie Peerage is decisive as to this. The claimant says that he is heir male of the grantee, and entitled upon failure of the line of the attainted party; but if that party had the whole estate in him the whole was forfeited. . . . There is no decision and no authority and no reason for altering the terms of the grant which constitute it one estate; and being all one estate at the time the party is attainted, the whole is forfeited." And Lord Lyndhurst, concurring, said: "But if this were an English peerage it is quite clear that, upon the death of the fourth Earl of Perth, there would have been an end to the earldom, because there would have been nobody to succeed. The next heir was attainted; his blood was corrupted; he therefore could not succeed; and there being an eldest son, nobody else could succeed. The earldom *would therefore escheat* and entirely cease.

* By the common law, upon attainder of petit treason or felony, all kinds of inheritances whereof the offender was seised in his own right . . . escheated to the King if the King was the immediate lord of the fee.

With respect to the law of Scotland, the peerage by that law may also be limited to a man and his heirs male general, as in this instance. Under such a limitation the peerage would descend precisely in the same way as in England; first to the lineal heir, and afterwards to the collateral heirs in succession. As each person succeeded to the title he would take the fee. But by the statute of Anne the corruption of blood and forfeiture, and other penalties arising from attainder, are applied to Scotland precisely as they are applied to England. It follows, therefore, that if the peerage would, in the case before us, be extinguished if it were an English peerage, it would be equally extinguished in the case of a Scotch peerage, *and not for the life only of the party attainted or during the continuance of his issue*, but it would terminate entirely. . . . I think, therefore, that the title is barred by attainder, and I am of opinion that the petitioner has failed in establishing his claim."

It was accordingly resolved that the claim had not been made out.

If the attainder of the heir apparent to a peerage had this effect, the attainder of the holder of a peerage cannot have had a less effect.

As to the *Airlie Case*, it is not questioned by the Committee.

The Airlie Case.
The Lumley Case.

The *Lumley Case* (*supra*, p. 197) is dealt with by the Committee in their fourth Report, at p. 286. With this case the Committee have no quarrel; it supports their view, which no one disputes, that a barony by writ is forfeited by attainder of treason, nor have they any fault to find with the cases of *Dacre* and *Audeley* (*supra*, pp. 197 and 198), supporting as they do the same incontrovertible proposition.

The result, then, is this: the principle enunciated in *Nevill's Case*, and affirmed by the House of Lords in the *Athol Case*, that a peerage limited in tail is, to a qualified extent, protected by the Statute De Donis, stands unimpaired. The attempt of the Redesdale Committee to discredit the principle fails, and the received views as to the results of attainder which prevailed before the Reports of the Redesdale Committee must be treated as correct.

The conclusion of the matter.

The cases which, among the many on attainder, might have been expected to throw most light on the subject are those occurring between the Statute De Donis, 1285, and the statute of 26 Hen. VIII., 1534 (whereby entailed estates were made forfeitable for treason). As a matter of fact, these afford little additional help. They do, however, go to show that during all that period peerages, whether in tail or not, were, almost without exception, treated as forfeited by attainder of treason. They also show to how large an extent, more especially in the latter half of the period, it was deemed expedient to effect or confirm attainder or forfeiture by Act of Parliament in preference to relying on common law proceedings merely.

Further cases.

1285—1534, 26 Hen. VIII. c. 13.

When Attainder or alleged Equivalent took place.	Name of Peerage.	Limitation or Assumed Limitation.	Whether Peerage treated as Lost.	Where dealt with in Reports of the Redcliffe Committee.	Observations.
15 Edw. II. (1322).	Earldom of Lancaster ...	Fee simple by girding.	Yes	Fourth Report, p. 268.	Irregular attainder of treason before the King and certain lords at Pontefract. (See Rot. Parl. II. p. 3.) It was reversed as erroneous, and brother and son restored in blood and honours 1 Edw. III. (1327). (Rot. Parl. II. p. 4.)
18 Edw. II. (1323).	Earldom of Carlisle	Probably in tail like an- nuity. (V. 18.)	Yes .....	.....	Irregular proceedings; judgment for for- feiture of peerage, and to be hung, drawn and quartered. Placita coram Rege, see Abbrev. Plac. p. 351.
14 Edw. II. (1326).	Earldom of Winchester... [Dispenser.]	Fee simple by girding.	Yes	Fourth Report, p. 368.	Act of violence; no proper attainder. Attainder reversed by Act of Parliament 21 Rich. II. 1397. (Rot. Parl. III. pp. 360, 367.)
20 Edw. II. (1326).	Earldom of Arundel	Fee simple ...	Yes	Fourth Report, p. 269.	Irregular condemnation to death confirmed by Act 1 Edw. III. Subsequent restora- tion in 5 Edw. III. of some lands to Richard, his son, and dignity. (Rep. Dig. V. p. 24.) The judgment and attainders against Edmund reversed on petition of Richard, his son, absolutely.
4 Edw. III. (1330).	Earldom of Kent	By girding; probably in fee simple.	Yes	Fourth Report, p. 271.	Irregular. Son restored 4 Edw. III. to lands and title (1331).
4 Edw. III. (1330).	Earldom of March	Fee simple ...	Yes	First Report, p. 298; fourth Report, p. 271.	Irregular proceedings (first Report, p. 298), but sanctioned by Lords in Parliament at instance of King. (Rot. Parl. II. p. 255.) Son obtained reversal of proceedings in 1354. (Rot. Parl. II. pp. 2, 267.)
11 Rich. II. (1388).	Dukedom of Ireland	No limitation; prob. intended to be for life.	Yes	Fourth Report, p. 272.	By appeal in Parliament, confirmed in all points by Parliament. (3 Rot. Parl. p. 237.)

11 Rich. II. (1388).	Earldom of Suffolk	Tail male	Yes	Fourth Report, pp. 272, 276.	Impeached in Parliament; judgment by the Lords—treason and forfeiture—affirmed in all points. (Rot. Parl. III. p. 11 Rich. II. p. 237.) No express mention of honours, but all lands and tenements. In 21 Rich. II. the judges considered the judgment erroneous, and it was reversed by Act. (See Rot. Parl. III. p. 359; affirmed <i>Idid.</i> p. 425.) Attainted on impeachment of Commons in Parliament 11 Rich. II. (1388) (Rot. Parl. III. p. 241), and to forfeit all lands and tenements; judgment ratified in Parliament (3 Rot. Parl. p. 251) same year. In 21 Rich. II. (Rot. Parl. III. p. 257) the proceedings annulled, but subsequently revived, and son died without issue. (Rot. Parl. III. p. 425.) As above in last case. Judgment of high treason (3 Rot. Parl. p. 237), forfeiting lands and tenements expressly (21 Rich. II.) reversed as erroneous. (Rot. Parl. III. p. 359; affirmed third Report, p. 425; annulled Rot. Parl. V. p. 549, 4 Edw. IV.) Behæuded without trial, but proceedings affirmed in 1 Hen. IV. by declaration of the Lords at instance of the Commons. (Rot. Parl. III. p. 453; see <i>Wiltes Perage Case</i> , L. R. 4 H. L. 126.) Attainted of high treason in Parliament 21 Rich. II. 1397 (Rot. Parl. III. p. 374), and to forfeit all lands, tenements and every manner of inheritance—not an Act.
11 Rich. II. (1388).	Beauchamp of Kidderminster.	Tail male. (V. 581.)	Yes .....	.....	
11 Rich. II. (1388).	Earldom of Oxford	Fee simple ...	Yes	Fourth Report, p. 271.	
1 Hen. IV. (1399).	Earldom of Wiltes	Heirs male for ever.	Yes .....	.....	
21 Rich. II. (1397).	Earldom of Arundel	Fee simple ...	Yes .....	.....	
1 Hen. IV. (1399).	Dukedom of Albemarle, kept Earldom of Rutland. Earldom of Surrey, kept Earldom of Kent. Dukedom of Exeter, Earldom of Huntingdon kept.	Tail male. (V. 118, 122.) Tail male. (V. 118, 122.) Tail male. (V. 118, 122.)	Yes	Fourth Report, p. 281. Fourth Report, p. 282. Fourth Report, pp. 277, 282.	Not an attainer, but a Parliamentary deprivation. (Rot. Parl. III. p. 452.)
			Yes		

1285—1534, 26 Hen. VIII. c. 13—*continued*.

When Attainder or alleged equivalent took place.	Name of Peerage.	Limitation or assumed Limitation.	Whether Peers treated as Lost.	Where dealt with in Reports of the Redcliffe Committee.	Observations.
1 Hen. IV. (1399).	Marquisate of Dorset, Earlom of Somerset kept.	Tail male. (V. 118, 122.)	.....	Fourth Report, pp. 277, 282.	Not an attainder, but a Parliamentary deprivation. (Rot. Parl. III. p. 482.)
	Earldom of Gloucester, Barony of Le Despenser kept.	Tail male. (V. 118, 122.)	.....	Fourth Report, pp. 277, 282.	
2 Hen. IV. (1400).	Earldom of Salisbury ...	Fee simple. (V. 32.)	No. Son summoned as Earl in 1409.	Fourth Report, p. 285.	
2 Hen. IV.	Earldom of Kent	Fee simple by girding.	No. Brother succeeded.	Fourth Report, p. 283.	Put to death without trial by peers. Approved by Lords in Parliament, and to forfeit. (Rot. Parl. III. 11 Hen. IV. p. 459.)
2 Hen. IV.	Earldom of Huntingdon.	Tail male	Yes	Fourth Report, p. 284.	Same judgment.
2 Hen. IV.	Barony of Despenser.....	Fee	Yes	Fourth Report, p. 286.	Same judgment as above. Reversed in 1 Edw. IV. (Rot. Parl. V. p. 284, general words.)
2 Hen. IV.	Barony of Lumley.....	Fee	Yes	Fourth Report, p. 286.	Attainted in 2 Hen. IV. as in case of Earl of Kent, <i>supra</i> .
5 Hen. IV.	Earldom of Worcester ...	Tail male ...	Yes. Died without issue.	.....	Attainted by Act 5 Hen. IV. (Rot. Parl. II. p. 526; Rev. Rot. Parl. VI. p. 262.)
7 Hen. IV. (1406).	Earldom of Northumberland.	Fee simple ...	Yes	First Report, p. 358; fourth Report, p. 279.	Judgment on attainder in Parliament for non-appearance. (Rot. Parl. 8 Hen. IV. p. 604.)
7 Hen. IV.	Barony of Bardolph	By writ	Yes	First Report, p. 358.	Same judgment as the last.

3 Hen. V. (1415).	Earldom of Cambridge, created 1st May, 1414.	Fee simple by girding. (See Wens- leydale as to effect.)	Yes	Fourth Report, p. 290.	Proceedings probably irregular, but ap- proved by the Lords in Parliament on petition of Commons (see Rot. Parl. IV. pp. 65, 66, 67), and all lands and tene- ments declared forfeited. Attainder annulled 1 Edw. IV. Ditto.
3 Hen. V. (1415).	Barony of Scrope of Mar- sham.	By writ	Yes	Fourth Report, p. 290.	Act of attainder (Rot. Parl. V. p. 349), estates, honours, dignities, and in- heritances whether in fee simple or fee tail forfeited.
38 Hen. VI. (1460).	Dukedom of York	Fee simple ...	Yes	Fourth Report, p. 292.	
	Earldom of Cambridge ...	Fee simple ...	Yes	Fourth Report, p. 292.	
	Earldom of March	Fee simple ...	Yes	Fourth Report, p. 292.	
	Earldom of Warwick	For life. (V. 275, 4.)	Yes	Fourth Report, p. 292.	
	Earldom of Salisbury ...	"Jure uxoris," for life.	Yes	Fourth Report, p. 292.	Attainted by Act of Parliament—murder and treason—and they and their heirs deprived of their peerages by express words, &c. Committee say this is the first time express words used. (Rot. Parl. V. p. 477.) "Deunabled for ever from henceforth to have, hold, inherit, or joy any name of dignity, estate, or pre-eminence." Restored 49 Hen. VI., but these proceedings reversed in 17 Edw. IV. (Rot. Parl. VI. p. 191.)
	Earldom of Rutland	<i>Query</i> only a courtesy title.	.....	Fourth Report, p. 292.	
	Lord Clynton	Writ .....	.....	Fourth Report, p. 292.	
1 Edw. IV. (1461).	Dukedom of Somerset ...	Tail male. (V. 116.)	Yes	Fourth Report, pp. 293—295.	
	Earldom of Devon	Heirs male for ever.	Yes.		
	Earldom of Northumber- land.	Fee simple.			
	Barony of Ross	By writ.			
	Barony of Nevill	By writ.			
	Dukedom of Exeter	Tail male. (V. 241.)			
	Viscounty of Beaumont.	Tail male.			
	Barony of Clifford	By writ.			
	Barony of Grey de Rug- mont.	By writ.			
	Barony of Dacre	By writ.			
	Earldom of Pembroke ...	Tail male.			
	Earldom of Wiltshire ...	Tail male.			
	Barony of Hungerford ...	By writ.			
	Barony of Welles	By writ.			

ATTAINDER.

1285—1534, 26 Hen. VIII. c. 13—continued.

When Attainder or alleged equivalent took place.	Name of Peerage.	Limitation or assumed Limitation.	Whether Peerage treated as Lost.	Where dealt with in Reports of the Redcliffe Committee.	Observations.
4 Edw. IV. (1464). 1475	Dukedom of Somerset ... Earldom of Oxford	 Heirs male for ever.	 Yes	 Fourth Report, p. 272.	Restoration of same year annulled, 4 Edw. IV. (1464). (Rot. Parl. V. p. 511.) The attainder by Act (Rot. Parl. VI. p. 146), and disabled from holding or inheriting any dignity. In 1483 there was a full restoration by Act 1 Hen. VII. (Rot. Parl. VI. p. 281.)
17 Edw. IV. (1477).	Dukedom of Clarence and held also Earldom of Salisbury Earldom of Warwick.	Fee tail Tail general.	Yes	Fourth Report, p. 301.	Forfeiture by Act of Parliament, and all letters patent annulled, including the title of duke. (Rot. Parl. VI. p. 193.)
1483	Dukedom of Buckingham Earldom of Stafford	Tail male. (V. 243.) Fee simple ...	Yes .....	.....	Attainder of treason and forfeit for self and heirs name of duke and all lands, tenements and hereditaments.
1 Rich. III. (1483).	Marquisate of Dorset ...	Tail male	Yes .....	.....	Attainder by Act 1 Rich. III. (1483). They and their heirs disabled from holding, inheriting or enjoying any dignity, estate, manor, &c. This Act annulled and dignities restored, 1 Hen. VII. (Rot. Parl. VI. p. 285.)
1485	Earldom of Norfolk .....	.....	.....	.....	Attained in 1521. Son restored 1547. Disabled from holding dignities, tenements or hereditaments. (Rot. Parl. VI. p. 246.) Restored by Act to dignities, tenements and inheritances. (Rot. Parl. VI. p. 315.)
					The attainder by Parliament, 1 Hen. VII. (Rot. Parl. VI. p. 276), and to forfeit all dignities, lands and hereditaments. Annulled in 4 Hen. VII., 1489, on petition of Thomas, late Earl of Surrey, but the Act only to extend to Earldom of Surrey.

1461	Earldom of Somerset.....	Tail male .....	.....	Attainted by Act (Rot. Parl. VI. p. 397), and to forfeit all honours, estates, lands and hereditaments. Beheaded 1463. Restored by subsequent Act (Rot. Parl. V. p. 311), but this subsequently reversed.
3 Hen. VII. (1487).	Earldom of Lincoln	Tail male	Yes.	
1493	Lovell.			
9 Hen. VII. (1494).	Earldom of Warwick.....	Tail general...	Yes	Special Act forfeiting all lands, tenements and hereditaments. Beheaded (19 Hen. VII.) 1499. All honours, castles, manors, tenements and hereditaments in fee simple, fee tail, or for term of life. (Rot. Parl. VI. p. 545.)
1509	Earldom of Devon	Tail male .....	.....	William Courtenay, son of the last earl, was attainted by Act of Parliament in 1504 and so could not inherit, but he was restored in blood and honours in 1511 and obtained a reversal of the attainder in 1512 and thereupon succeeded. In 1525 he was also created Duke of Exeter, but was attainted in 1539.
1521	Dukedom of Buckingham			
1540	Earldom of Stafford. Earldom of Essex	Tail male	Yes	Attainder by Act forfeiting dignities. His son was summoned to Parliament as Lord Cromwell. 1534 in the Statutes of Hen. VIII.

Special Acts of Attainder and Forfeiture.

Special Acts
of attainder
and forfeiture.

Acts of attainder are of two kinds :—

1. Those which confirm an attainder at common law, or an irregular attainder.
2. Those which enact attainder or forfeiture without any preliminary proceedings.

The earliest record of an Act of the former kind would seem to be that of 1 Edw. III. (1327), confirming the irregular condemnation and execution of Edmund, Earl of Arundel.

Other Acts on
same subject.

The following other instances of Acts of attainder and forfeiture may be cited :—

Richard II. Parliament confirms in all points the condemnation and forfeiture of the Duke of Ireland, Earl of Suffolk, and others. (See Rot. Parl. III. 237.)

1397 (21 Rich. II.). The Earl of Arundel is attainted by Act of Parliament of high treason, and it is enacted that he shall forfeit all lands, tenements and hereditaments.

1401 (2 Hen. IV.). Judgment of attainder and forfeiture against the Earl of Salisbury. This is affirmed good in Parliament in 5 Hen. V. (Rot. Parl. IV. 176.)

1415 (3 Hen. V.). The proceedings against the Earl of Cambridge are approved by the Lords of Parliament on petition of the Commons (see Rot. Parl. IV. 65), and all the earl's lands and tenements declared forfeited.

1460 (38 Hen. VI.). Several great nobles are attainted by Act of Parliament and sentenced to forfeit their estates, honours, dignities and inheritances, whether in fee simple or fee tail.

1461. The Duke of Somerset, the Earl of Devon, the Earl of Northumberland and other noblemen, are attainted by Act of Parliament of murder and treason, and they and their heirs deprived of their peerages by express words. They are declared to be unable for ever from thenceforth to have, hold, inherit or enjoy any manner of dignity, estate or pre-eminence. (Rot. Parl. IV. 477.) This was in 1461.

1475. The Earl of Oxford is attainted by Act of Parliament, and disabled from holding or inheriting any dignity. (Rot. Parl. VI. 146.)

1472 (11 Edw. IV.). It is enacted that George, Duke of Clarence, shall be convicted and attainted of high treason, and that he shall forfeit for himself and his heirs the dignity and name of duke, and all honours, lands, tenements, hereditaments and possessions, and that all letters patent made by the King to the said duke shall be from thenceforth utterly void.

1483 (1 Rich. III.). The Duke of Buckingham is attainted and

disabled from holding, inheriting or enjoying any dignity, estate, manor, &c.

1485. The Earl of Norfolk is attainted by Act of Parliament, and to forfeit all dignities, lands and hereditaments.

1487. The Earl of Lincoln is attainted by Act of Parliament (Rot. Parl. VI. 397), and to forfeit all honours, estates, lands and hereditaments.

1494. The Earl of Warwick is attainted by Act, and to forfeit all honours, tenements and hereditaments in fee simple, in tail or for term of life.

1509. The Earl of Devon is attainted by Act of Parliament, and disabled from inheriting, &c.

1540. The Earl of Essex is attainted by Act of Parliament, and to forfeit all dignities, &c.

1540 (31 Hen. VIII.). An Act of Parliament is passed for the attainder and forfeiture of Edward Neville. The Act recites that he and others with him have been convicted and attainted of high treason by the common law, and enacts that they shall stand and be attainted of high treason, and shall lose and forfeit all their manors, lordships, lands, tenements, &c. and other their hereditaments of the name or nature.

Many other later Acts of attainder and forfeiture will be found referred to in Hatsell IV. 217 *et seq.*, 300 *et seq.*, and in the State Trials.

In early days an Act of attainder was sometimes passed at the instance of the Commons, but the practice has become obsolete, and, in later times, proceedings for an attainder have always originated in the House of Lords.

Bill introduced in Lords.

Attainder ought not to be introduced by way of amendment to a Bill.

Thus, in 1701, a Bill for the attainder of the pretended Prince of Wales passed the House of Commons and was sent up to the Lords, who returned it with an amendment extending the attainder to Mary, the wife of the late King James II. To this amendment the Commons objected, on the ground that "they believe that it may be of dangerous consequence to attaint persons by an amendment only." The Lords thereupon waived their amendment, and the Bill was passed.

CHAPTER XVIII.

RESTITUTION OR RESTORATION.

Restitution or restoration. **ATTAINDER**, and the corruption of blood which ensued upon it, could only be removed—

1. By reversal of the judgment in due course of law; or
2. By Act of Parliament.

The King could, it is true, and can, grant the offender a pardon, and could and can restore to him and his heirs, or, if he were dead, to his heirs, any lands or other property which might have been forfeited or might have escheated to the Crown in consequence of the attainder; but the original dignity could not and cannot be restored in this manner, nor could the corruption of blood be so got rid of.

"The reason," says Coke in his Institutes (III. chap. 106), "wherefore the King may by his charter pardon the execution and restore the party or his heirs to the lands forfeited by the attainder and remaining in the Crown is for that no person hath thereby any prejudice; but to make restitution of his blood he cannot do it but by Act of Parliament, because it should be to the prejudice of others."*

Restorations partial and complete.

"Of restitutions by Parliament," says Lord Coke (Inst. III. chap. 106), "some be in blood only (that is, to make his resort as heir in blood to the party attainted and other his ancestor, and not to any dignity, inheritance, or land, &c.). And this is a restitution *secundem quid*, or in part: and some be general restitutions in blood, honours, dignities, and all that was lost by the attainder, and this is *restitutio in integrum*."

Restoration by Act of Parliament.

Restoration by Act of Parliament.

In construing Acts of restoration it is very important to bear in mind the distinction drawn by Lord Coke between restorations in blood only and other restorations. It is one which Lord Cairns in the *Montacute Peerage Case* (L. R. 7 H. L. 305) seems to have overlooked, for, referring to the Act of restoration under consideration in

* In 19 Hen. VII. an Act was passed giving the King, during his life, wide powers to reverse attainders.

that case, his Lordship says that it prayed “that your subjects Katherine and Winifred and their heirs may and shall be by authority of this Act restored and enabled onely” (I take that to mean *wholly*) ‘in blood as daughters and heirs to the said Henry.’” This was manifestly a misconception of the word “onely.”

The following instances of restoration by Act may be mentioned.

In 15 Edw. II., Thomas, Earl of Lancaster, was by a Court held before the King and several Lords at Pontefract adjudged guilty of high treason and executed. But in the first Parliament of Edward III. this judgment was reversed as erroneous on the petition of Henry de Lancaster, brother and heir of Thomas. (See Rot. Parl. II. 3.) Henry de Lancaster, in his petition to Parliament, styled himself only Henry de Lancaster, and not Earl of Lancaster.

Lancaster
restoration
(1 Edw. III.).

In 4 Edw. III., Edmund, son of Edmund, Earl of Arundel, attainted in 1331, petitioned to the King in Parliament for delivery of the lands of his father, and that he should not lose his name of earl, and for restoration in blood, and was granted relief by Act. (R. C. V. 24.)

The Kent
restoration,
1331.

In 5 Edw. III., Richard FitzEdmund, Earl of Arundel, petitioned the King in Parliament, stating that his father Edmund, late Earl of Arundel, had been taken and executed contrary to law, and praying that Richard might be restored to his rights and inheritance. To this an Act of Parliament (1 Edw. III.) affirming the judgment was objected, but the King of his grace granted to Richard all the lands which his father had died seised in fee (with certain exceptions), and the King, by the assent of the Parliament, granted to Richard d'Arundel that he should not lose the name of earl, honour, action, right, &c., through his father, as of the blood of his father, by reason of the said judgment and execution thereupon; and that he should be as able in all conditions as if no judgment had been rendered against his father or execution done.

The Arundel
restoration,
1331.

This proceeding, say the Redesdale Committee, appears to have had the effect of an immediate parliamentary restitution of the dignity of earl of Richard, as son and heir of his father, and of all the lands of his father not excepted, &c. (R. C. V. 24; fourth Report, 268 *et seq.*; see also Act of 28 Edw. III. annulling the proceedings, Rot. Parl. II. 257.)

In 4 Edw. III., Roger Mortimer, Earl of March, was tried before the temporal Lords in Parliament and condemned to death, and was executed; but the proceedings were irregular, and in 28 Edw. III. (1354) Roger, his grandson, obtained an Act reversing the attainder and annulling the proceedings. (Rot. Parl. II. 255.)

March
restoration,
1355.

In 11 Rich. II., the Earldom of Oxford, held in fee simple by Robert de Vere, Duke of Ireland, had been forfeited on his attainder for high treason. The earl had fled the kingdom and died abroad.

The De Vere
restoration,
1293.

Thereupon Aubrey, his uncle and heir, prayed for delivery of certain entailed lands, and by Act of Parliament in the form of a charter the King restored the earldom to Aubrey and his heirs male for ever, together with livery of the entailed lands on his making proof of the entail. (See App. No. 34.)

The Arundel and Surrey restoration, 1399.

In 1 Hen. IV., the Commons petitioned for the restoration of Thomas, son and heir of Richard, formerly Earl of Arundel and Surrey, who had been wrongfully put to death in the time of Richard II. The petition prayed that Thomas be restored to his name of earl to him and his heirs male, to their honour, degree, and estate in all Parliaments and councils, and also to all castles, lands, tenements, rents, &c., which in England, Wales, Caley, or elsewhere seised into the hands of Richard II. by force of the said false appeal and erroneous judgments, and relief was granted accordingly by Act. (R. C. V. 136; Rot. Parl. III. 425—436.)

The Warwick restoration, 1399. (R. C. V. 132; Rot. Parl. III. 425; 1 Hen. IV.)

This was an Act for the restoration of Thomas, Earl of Warwick. It was in the form of a petition by the Commons, which was assented to by the Lords and the King. It recited the arrest of Thomas, Earl of Warwick, in the reign of Richard II., his condemnation in Parliament, his being sentenced to death for treason, and the seizure of his lands, and prayed that the judgments and ordinances might be annulled, and that Thomas should be restored to his name of earl to him and his heirs male in Parliament, and also to all other tenements and hereditaments taken in the hands of Richard II. by force of the judgments. (R. C. V. 132; Rot. Parl. III. 436.)

The Salisbury restoration, 1408.

In 9 Hen. IV. Thomas Montague, Earl of Salisbury, petitioned the King in Parliament for relief. The petition recited that John, Earl of Salisbury, father of the petitioner, had been condemned as a traitor in Parliament (2 Hen. IV.), and that this was confirmed in Parliament, and the petitioner prayed for restoration; and in answer the King, with the authority of Parliament, granted and allowed that Thomas should be restored in name and in blood, and to have all lands, &c.

The above would seem to have been only a partial restitution, for in 1 Edw. IV. (Rot. Parl. V. 357) there is a full restitution and reversal of the attainders.

The Lumley restoration, 1412.

In 13 Hen. IV., John Lumley, son of Ralph and brother of Thomas, petitioned the King in Parliament that he would by the advice of the Lords spiritual, &c., grant to the petitioner that he might be restored to the name and ability to be son and heir of Ralph and brother and heir of Thomas, the rebellion and forfeiture of Ralph and Thomas and the judgments against them by which they were attainted of high treason notwithstanding, and that he and his heirs might be made able to be heirs to all their ancestors, &c., and that he

and his heirs might thenceforth be heirs to the said Ralph and Thomas, and able to have use and enjoy every action, claim for suit, demand, challenge, and advantage as heirs to the said Ralph and Thomas, and to all his ancestors of all seignories, castles, manors, lands, tenements, &c. of which the said Ralph and Thomas, or any of their ancestors or other to their use, were seised in fee simple or fee tail, and that the petitioner might be restored to the said lands and tenements which belonged to the said Ralph and Thomas at the times of their deaths, or to any of their ancestors, the said judgments given against the said Ralph and Thomas before that the blood between the said Ralph and Thomas was corrupted for the causes aforesaid notwithstanding. To this petition the answer was: The King, by advice of the Lords spiritual and temporal, and by the request of the Commons in Parliament, has granted this petition in all things ascertained therein. But this restoration in blood was not considered as enabling the petitioner to claim the dignity of baron, which was treated as forfeited by the attainder of his grandfather and father. (See Rot. Parl. III. 655; and Redesdale, third Report, p. 286.)

Henry, son of the Earl of Northumberland, had been attainted in 5 Hen. IV. In 2 Hen. V. his son Henry, grandson of the earl, petitioned the King in Parliament that he might be restored to the name and ability to be son and heir of his father and cousin and heir of his grandfather, and all their ancestors, and to the name of Earl of Northumberland, the judgment against his father and grandfather given in Parliament, or in any other manner notwithstanding; and that he might have all the seignories, castles, lands, tenements, which were entailed on his father and grandfather, or any of their ancestors, and which the petitioner ought to have had to him and the heirs of his body if not forfeited by his father or grandfather, notwithstanding any impediments found to the contrary of such entails, or that the blood between him and his father and grandfather were corrupted. The King, by the authority of Parliament, granted the petition, the petitioner suing in the Chancery and proving the entails, saving to the King the forfeiture of lands of which the father and grandfather were seised in fee simple. (Rot. Parl. V. 37.)

The Northumberland restoration, 1415.

In 4 Hen. V. (R. C. V. 185), Thomas de Holland prayed the King in Parliament to restore to him the name of Earl of Huntingdon, forfeited by his father in the time of Richard II., and lands, &c., which petition being read in Parliament, the King, with the assent of Parliament, granted the petition, but required the petitioner to produce entails of the lands and tenements. (R. C. V. 185.)

The Huntingdon restoration, 1416.

Margaret Plantagenet, daughter of George, Duke of Clarence, attainted of high treason by Act of Parliament 17 Edw. IV., and sister of Edward, Earl of Warwick, only son of the said George and

The Countess of Salisbury restoration, 1520.

Isabel, eldest daughter of Richard Neville, Earl of Warwick and Salisbury, which Edward was attainted of high treason in 15 Hen. VII. before John, Earl of Oxford, then being High Steward. The said Margaret was by Act of Parliament, temp. Hen. VIII. restored to the style, estate, name, title, honour, and dignity of Countess of Salisbury. She was the last who bore the famous surname of Plantagenet. (Coke's Inst. III. chap. 106.)

The second
Lumley
restoration,
1547.

By an Act of 1 Edw. VI., on the petition of John, son of George, reciting the attainder of George, the son and heir of John, then late Lord Lumley, that by reason thereof John was a person in lineage and blood deprived of all degree, estate, name, fame, and other inheritance from his father, or John, late Lord Lumley, his grandfather, to which he would have been entitled if George, his father, had not been attainted, and also all other inheritances which might have come to him from whatsoever collateral ancestor by his father's side, it was enacted that John Lumley and the heirs male of his body should have the dignity, estate, and pre-eminence of a baron of the realm by the name of Lord Lumley, and to enjoy in all Parliaments the place of a baron; and that John and his heirs should be restored and enabled only in blood as son and heir to the said George and as cousin and heir and heirs of the said John, late Lord Lumley, and made only heir and heirs in blood as well to the said George as to the said John, late Lord Lumley, or either of them, by the name of Lord Lumley.

It was afterwards held (Collins' Claims, 373) that the attainder of George Lumley was not reversed by the Act of 1 Edw. VI., and that the restitution of John, Lord Lumley, in blood only, whilst the attainder remained unreversed, could not revive the ancient dignity which was before extinct and merged in the Crown in consequence of the attainder. The House therefore resolved, in effect, that by the attainder of George Lumley in the lifetime of his father, though he was excluded upon his attainder and died before his father, John, the son of George, was incapable of succeeding to the title on the death of his grandfather.

That although by the Act 1 Edw. VI. John and his heirs were restored in blood . . . yet they were not thereby restored to the dignity, and that the Act declaring that John Lumley and his heirs should have the dignity of a baron of the realm, by the name of Lord Lumley, gave to John a new barony, descendible to the heirs male of his body only, and which became extinct on his death without issue male.

That therefore the ancient dignity was never vested in John, last Lord Lumley, and that the descendant of his sister Barbara, though heir of John, thus restored in blood, could not, by virtue of that restoration, claim the ancient dignity before merged and extinguished.

Another instance of restoration is the Act passed in the first year of Edward VI. (1547), in favour of Henry Stafford, son of the attainted Duke of Buckingham. By that Act it was declared that Henry and the heirs male of his body should be accepted, called, and written from thenceforth by the name of Lord Stafford, and should enjoy in Parliament and all other places the room, name, place, and voice of baron; and he and his heirs were also generally restored in blood as heirs of the duke, his father, and made heirs to the duke, by the name of Lord Stafford, in blood, and enabled to enjoy all honours, &c. which should thereafter come to him or them from any collateral ancestor except as therein excepted, and so always as not to convey to the said Henry or his heirs any estate, name, dignity, pre-eminence, possession, or hereditaments of the late duke other than such as were in the Act limited to Henry.

The Buck-
ham
restoration,
1547.

Act of restitution of Sir Edward Neville, knight. Mary the Queen. "Soit faicte come il est désiré." The Act, thus indorsed, was made on the petition of Edward Neville, eldest son of Sir Edward: "In most humble wise beseecheth your Majesty your true and faithful servant and loyal subject Edward Neville esquire eldest son of Sir Edward Neville knight." It recites the attainder of Sir Edward Neville on 4th October, in the thirtieth year of Henry VIII., and the Act of attainder and the Act of restoration, and proceeds to ratify that Act, and further ordains and enacts that, for lack of heirs male of the body of the Right Honourable Edward Neville, knight, now Lord Abergavenny, the petitioner may have, hold, and enjoy to him and to the heirs male of his body all such honours, castles, baronies, and hereditaments whatsoever which, by the last will and testament of the Right Honourable George Neville, knight, late Lord Abergavenny, were held, given, entailed in use or possession for default of heirs male of the bodies of the said George, Lord Abergavenny, and Lady Mary, his wife, and for lack of heirs male of the body of the said Sir Thomas Neville, knight, deceased, brother unto the said George, Lord Abergavenny, to the said Sir Edward Neville, knight, and to the heirs male of the said Sir Edward lawfully begotten; and the Act then proceeds to make further provision as to the devolution of those estates, and adds a clause in effect making the same inalienable. (R. C. V. Appendix.)

The Neville
restoration,
1553.

Edward Courtenay, Earl of Devon, the son of Henry Courtenay, late Marquis of Exeter, who had been attainted of treason, was restored in blood by an Act of Parliament passed in this year on his petition, whereby he prayed that he and his heirs might be restored in blood only as well sons of his father as to all other collateral and lineal ancestors, and power as heir to demand, sue and enjoy all lands, tenements and hereditaments which might thereafter come, remain or

The Devon
restoration.
1 Mary, 1553.

descend as though there had been no such attainder, and the attainder, so far as corruption of blood, was to be void. Edward Courtenay, thus restored, died 18th Sept. 1556 (3 & 4 P. & M.) without issue.

On his death a question arose as to the effect of this Act of restoration, and by the Queen's command it was referred to the Chief Justices, Chief Baron and others, who were unanimously of opinion that the Act of restitution extended to the heirs collateral of the said Edward, and not merely to his heirs lineal, and accordingly that on his death without issue, which event had occurred, the heirs collateral could inherit from him. (See Coke, Inst. III. chap. 106.)

The
Montague
restoration,
1553.

Another example of an Act of restoration is afforded by an Act passed in 1553 (1 Mary, sess. 2, c. 1), intituled "An Act for the restitution in blood of the heirs of Henry Pole, late Lord Montague." This Act, which was a private one, was in the form of a petition to the Queen from the two ladies, Katherine and Winifred, the only children of Henry Pole. It recites his attainder, and prays that they and their heirs might be restored and enabled in blood only as daughters and heirs of Henry, and enabled to ask, have, hold and enjoy all such honours, castles, manors, lordships, &c., and all other manner of hereditaments, &c. which at any time shall come, remain, descend or revert from any lineal or collateral ancestor of your said subjects, &c., other than such castles, manors, lordships, &c. which were of the said Henry Pole in possession, reversion, remainder or otherwise at the day of his attainder. The position was this. Henry Pole had died in the lifetime of his mother, Margaret Pole. Margaret Pole had three baronies vested in her—Montacute, Monthermer, and Montacute, a second of the name. Henry, the son, had been summoned in her lifetime, and had sat as Lord Montacute. In 1538 both mother and son were attainted. The son was beheaded the same year, but the mother was spared for a time. The argument founded upon the Act was that the restoration enabled the petitioner to inherit from Margaret the dignities that she had lost, or at any rate to inherit from their father the dignity vested in him by the summons in his mother's barony. This view, however, the Lords refused to adopt. "The hereditaments," said Lord Cairns (*Montacute Case*, L. R. 7 H. L. 311), "which these ladies are by this Act enabled to claim are not hereditaments which, but for attainder, might have descended to them before that time, or which had descended to them, but hereditaments which, speaking with regard to the future, shall come, remain or descend or revert, not from their father, but from any lineal or collateral ancestor of the two ladies. Of course, putting aside altogether the case of Margaret, that would have an intelligible meaning, because it would provide in favour of these suppliants that in case property

should descend to them upon the side of their grandfather, Sir Richard Pole, or any ancestor of his from that side of the pedigree, it should come to them freely notwithstanding the attainder of their father, which attainder otherwise would have interrupted that descent. . . . My Lords, nothing to my mind could be more clear than the frame of this Act of Parliament. It is not to restore anything which was in Henry in the shape of property or in the shape of honour; it is not to restore anything which the Crown either had taken or might have taken by way of forfeiture from Henry by reason of his attainder; it is not to restore anything which could have come to the suppliants, but for the attainder of any person other than Henry. It takes the attainder of Henry and the attainder of Henry only, and it puts out of the way the effect and operation of the attainder of Henry for this object and for this object only: to allow to come to the daughters of Henry, Lord Montague, inheritances which they might derive from persons as against whose succession the attainder of Henry would have been an obstacle. It removes no other obstacle whatever out of the way. It appears to me, therefore, that with regard to the three peerages which I have mentioned, which must find their way and be traced, not through Henry in the first instance, but through Margaret, his mother, that the attainder of Margaret remains at this moment in full force and operation, and that there is no succession to those peerages which can be traced through Margaret." Turning then to the peerage supposed to be vested in Henry Pole, Lord Montague, by virtue of his summons to Parliament in 21 Hen. VIII., that is, in 1529, and also in 1533, in which he sat on several occasions, Lord Cairns was of opinion that "he was merely sitting in Parliament by virtue of the barony possessed by his mother, and was in point of fact called by writ in virtue of his mother's barony." Even supposing that it could be treated as a new peerage, his Lordship considered that the Act could not touch it because "it appears to me that under that very large collection of drag-net words which your Lordships find in the Act, it would be, to say the least, extremely doubtful whether a peerage of the kind I have described would not be included, and would therefore be excepted out of the operation of the Act as that which was made incapable of passage from the father to the daughters." Passing from that to the other alternative, namely, that Henry Pole was sitting in Parliament, not in his own right, but as being called by writ in virtue of his mother's barony, his Lordship expressed doubt whether the fact that the son was sitting in Parliament in the mother's barony would, if the father or mother should be attainted for treason, save from the consequences of that attainder the barony in respect of which he had been called to Parliament by writ.

Another noticeable Act is that for restitution of the blood of Lord The Dacre
restoration.

Dacre of the South, 1558. This also was in the form of a petition by Gregory Fynes, brother and heir of Thomas Fynes, son and heir of Sir Thomas Fynes, knight, late Lord Dacre of the South. It recites that Lord Dacre, by the Courts of the common law of the realm, had been attainted of felony and other offences, "by reason whereof your said subject standeth and is a person in his blood, lynage, honour, degree and dignity corrupted"; and it goes on to pray that "it may therefore please your Highness, of your noble and abundant grace, that it may at the humble petition of your said subject be ordained and enacted by your Highness with the assent [of Parliament] and by the authority of the same that your said subject and his heirs may be and shall be by authority of this Act restored and enabled in blood, lineage, honour, degree and dignity as son and heir unto the said Sir Thomas Fynes, knight, Lord Dacre, and that your said subject and his heirs may be and shall be enabled in blood and degree to demand, ask for, hold and enjoy any honours, castles, tenements and all manner of hereditaments, &c. other than such honours, manors, lands, tenements and hereditaments as your said most noble father or any of your Highness's progenitors or ancestors or your Highness is or was entitled to have by reason of the said attainder . . . And that your said subject and his heirs may hereafter be and have any action or suit and make his pedigree conveyance in blood, lineage, honour, degree and dignity as heir as well to and from his said father as also to any other person or persons in like manner born in degree, &c. as if the said Sir Thomas Fynes Lord Dacre had never been attainted and as if no such attainder were or had been had, the corruption of blood between the said Sir Thomas Fynes late Lord Dacre and your said subject and his heirs the judgments, &c. or anything whereby the blood of the said Sir Thomas Fynes should be corrupted to the contrary in any way notwithstanding, &c." (R. C. V. 361, Appendix.)

The Northumberland (Dudley) restoration, 1558.

In 4 & 5 Philip and Mary an Act for the restitution in blood of the children of John Dudley, Duke of Northumberland, attainted of high treason in 1 Mary, was passed. By this Act the children of the duke were restored and ennobled in blood and name and made heirs as well to the attainted duke as also to any other their ancestor or ancestors lineal or collateral, as if the said duke had never been attainted, the corruption of blood notwithstanding, and they were enabled to demand, hold and enjoy all lands, tenements and hereditaments at any time thereafter descending, coming or remaining, as if the said duke had not been attainted, the corruption of blood notwithstanding; but the Act was not to be taken to restore or entitle the petitioners, or any of them, or their heirs, to any name of honour, or dignity, &c.

An Act (18 Elizabeth) for restitution in blood of Henry Norris, Knight, Lord Norris of Rycot. The Norris restoration, 1375.

This Act, which is framed as a petition, recites the attainder of Henry Norris, the petitioner's father, of high treason, and prays that he may be restored and enabled and made heir to the said Henry Norris, the father, and all other his ancestor or ancestors, and made heir to them and every of them in name, blood, state, degree and inheritance to all castles, manors, lordships, rights, possessions and hereditaments, and made inheritable without corruption of blood. (R. C. V. 362, and Appendix.)

Acts of restoration as marks of royal and parliamentary favour are to be construed with peculiar benevolence in accordance with the maxim, "In cartis benigna facienda est interpretatio . . . in restitutionibus benignissima," for it is held so in our books that in restorations the King himself hath no favour nor his prerogative any exemption, but the party restored is favoured. Benevolent construction of Acts of restoration.

But this maxim cannot be used to extend the scope of the Act, as is shown by the *Montacute Peerage Case* (L. R. 7 H. L. 308).

There the maxim was invoked by counsel, who argued that the Act of 1 Mary was an Act of mercy, and must, therefore, be liberally construed: that there could be no doubt as to the favour the Crown intended to confer; it was in all probability the anxious wish of Queen Mary to atone to this family for all past sufferings, and to show the royal mercy and goodwill in the most marked and especial manner; that the extensive and forcible expressions in the Act proved that the favour of the Crown was meant to be a complete restitution to these heirs of all that their father would have possessed had he never been attainted, and its evident object could not otherwise have been secured. But despite these arguments the Committee for Privileges declined to go beyond the words of the Act. "I shall only say this," remarked Lord O'Hagan, "that in my view we must be guided altogether in determining this question by the very words of the Act of Parliament. The extremely ingenious argument that was presented to us with respect to the probable liberality and charity of the Legislature in passing the Act we have been considering does not affect my mind at all."

The Procedure for Restoration.

Coke says (3 Inst. chap. 106) that Bills of Restitution may begin in the Parliament either in the House of Commons or in the Lords' House; but in modern times a Bill for reversing an attainder, for the Procedure for restoration.

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restitution of honours and lands, and for restoration in blood is first signed by the (King), and then presented by the Lord Chancellor to the House of Peers by command of the Crown, after which it passes through the ordinary stages, and is sent to the Commons. Here the (King's) assent is signified before the first reading; if this form be overlooked the proceedings will be null and void. (May, Parl. Pr. 11th ed. 862.)

For an interesting and remarkable Act of restoration, see Earldom of Mar Restitution Act, 1885 (48 & 49 Vict. c. 48).

CHAPTER XIX.

ACTS OF PARLIAMENT FOR DEPRIVATION.

THE omnipotence of Parliament under our Constitution may do anything. It may, it would seem, deprive a peer of his peerage on grounds of public policy, but such a proceeding is naturally of a very exceptional character, and in fact one instance only is to be found on record of a deprivation of this kind, 17 Edw. IV. (Rot. Parl. V. 409), declaring the degradation of George Neville from his name of duke.

Acts of Parliament for deprivation.

Public grounds, e.g., poverty (Duke of Bedford, 1478).

The Act recites that George Neville, Duke of Bedford, as it is openly known, hath not nor by inheritance may have any livelihood to support the name, estate, and dignity, or any name, estate, or dignity, and oftentimes it is seen that when any lord is called to high estate and hath not livelihood conveniently to support the same dignity, it induces great poverty, indigence, and causes oftentimes great extortion and embracery for his maintenance to be had to the great trouble of all such countries where such estate shall hap to be inhabited, wherefore the King, by the advice and assent of his lords spiritual and temporal and the Commons in this present Parliament assembled, and by the authority of the same, ordaineth, establisheth, and enacteth that from henceforth the same erection and making of duke, and of the name of dignity given to the said George or to the said John Neville, his father, be from henceforth void and of no effect, and that the said George and his heirs from henceforth be no dukes nor marquis, earl, nor baron, &c. The deprived peer died s. p. 1483. The policy is the same as that which has dictated the disqualification of a peer by reason of his bankruptcy. (Bankruptcy Act, 1883, s. 32 (1), (A).)

But for an Act of Parliament to operate to take away or extinguish the dignity of a peerage the wording of the Act must be clear and precise. This is illustrated in the *Earl of Waterford's Claim* (6 Cl. & Fin. 831). The earldom in question in that case had been granted by Henry VI. in 1445 in tail male, the grantee being also the then Earl of Shrewsbury, and the petitioner was heir male of the body of the original grantee. By an Irish statute (28 Hen. VIII.), dealing with absentees, the Act, after reciting, as a reason, the long absence

Or long absence from kingdom (Earl of Waterford's Claim, 1832).

of George, Earl of Shrewsbury, out of the realm, declared that the King, his heirs and assigns, should have and enjoy, in right of his Crown of England, all honours, manors, castles, lordships, franchises, hundreds, liberties, counties palatine, jurisdictions, annuities, lands, tenements, and hereditaments, and all other profits, as well spiritual and temporal, which the said Earl of Waterford, or any other person or persons, had to his use. In 1612 the question was raised whether the effect of this statute was to take away the title and dignity of Earl of Waterford, and the two Chief Justices and the Chief Baron were directed to consider the case and to certify their opinion. The conclusion at which they arrived, according to the report in 12 Coke, p. 107, was that the Act not only took away the possessions of the earldom but also the dignity itself. The claimant, however, being dissatisfied with this opinion, and determined to press his right to the title, addressed, in 1832, a petition to the House of Lords, claiming to be entitled to vote at the election of Irish representative peers. The House thereupon, with a view to a more solemn adjudication, recommended the petition claiming the vote in respect of the earldom to be presented to the Crown, so that it might be referred by the Crown to the House with the report of the law officers of the Crown annexed. This was accordingly done, and the matter was, in due course, referred to the Committee for Privileges, who resolved that the claimant had made out his claim to be Earl of Waterford, in the kingdom of Ireland, and had also made out his claim to be admitted as a temporal peer of Ireland to vote at the election of peers to represent the peerage of Ireland in the Parliament of the United Kingdom. This resolution was reported to the House and agreed to. The Lord Chancellor, Lord Cottenham, in addressing the House, said: "My Lords, it has been admitted by the counsel for the Crown that if this was now the first time that an interpretation was to be put upon this Act of Parliament, there could be no doubt entertained as to what should be the construction." His Lordship then referred to the opinion of the Chief Justices in 1612 and to the Act depriving Neville of his dignity in 17 Edw. IV. by express words, and continued: "If such words had occurred here the cases would have been similar, but no such words are found in this Act. There are only words which vest whatever is referred to in the Crown. If those words vest this title of honour in the Crown, it may be said it does not signify whether there are words taking it away or not; that what is given to the Crown cannot be holden by the subject; that 'the King, his heirs and assigns, shall have, hold, and enjoy, as in the right of the Crown of England, all,' and so forth. Those words 'hold and enjoy' clearly do not apply to a dignity, but to that which was the subject of tenure. Then it is said if an honour and dignity be considered to be the subject of this

Act those words are to be read 'reddendo singula singulis'; that the King was to enjoy those which could be enjoyed, and to hold those which might be held. Nevertheless, the words are that the Crown shall have, hold, and enjoy, and one is unable to understand how the Crown, the fountain of honour, could hold and enjoy an honour, supposing that to be the subject of the Act. It appears impossible to understand that the Crown can have, hold, and enjoy an honour which has been granted and has been destroyed by an Act of Parliament. Nor is there any light thrown upon that point in the arguments of these learned persons There is not to be found in the enumeration of particulars in the enactment anything to which the character of possessions does not apply, or anything which makes it clear that dignities or titles of honour were the subject-matter of enactment The word 'honours,' as connected with those other words of description, is stated by Lord Chief Baron Comyn and other authorities to apply to a collection of manors," and the Lord Chancellor was accordingly of opinion that the claimant had made out his case. Lord Plunket said that he should not consider it necessary to make any observations on the case were it not for the very great respect and veneration which he felt for the name of Sir Edward Coke; but he thought it due to the memory of that most distinguished person that they should not lightly express an opinion tending to interfere with his deliberate judgment without assigning some reason for doing so. His Lordship then referred to and criticized the opinion of Lord Coke, and distinguished the case from that of Neville, Duke of Bedford. "I therefore think," he continued, "that the argument of Lord Coke has no foundation, and that this case is not within the mischief which he alleged was intended to be remedied by the Act 17 Edw. IV.; namely, the holding a dignity when clothed with poverty. The mischief intended to be provided for by the Act of Henry VIII. was of another description altogether. The mischief to be remedied by that Act was that of a person to whom ample possessions had been given on consideration that he should defend them against the enemies of the King in Ireland, but who neglected to defend them and allowed them to get into the possession of persons inimical to the Crown. It was deemed right in such case that those possessions should be resumed, but that was no reason why the title of honour should be resumed, because that title had not got into the hands of the King's enemies; and I believe I am correct when I state that in respect of a title of peerage the word denoting it is not 'honour'—that word in itself is not a word equivalent to the dignity of peerage, but name, style, and dignity The object of the Act was to vest certain property in the Crown. Nothing is taken away from any of the persons whose names are introduced into this Act of Parliament by any direct terms. It is merely by

inference they are deprived of anything. They are not deprived of their lands, their honours, or their manors by any direct words, but these are vested in the Crown; and by those honours and manors, and so on, being vested in the Crown the persons named are deprived of them. Then if this dignity was incapable of being vested in the Crown, would it not be stretching the Act of Parliament beyond any legitimate inference which can be derived from it to say that that which cannot be holden by the Crown shall be taken away from the person possessing it? I am of opinion that this dignity of peerage was not, nor was intended to be, taken away. I therefore concur in the opinion which has been expressed that this extra-judicial opinion given by Lord Coke and the other learned judges on this subject ought not to weigh with us, and that upon the construction of the Act of Parliament this case is perfectly clear."

CHAPTER XX.

PROCEDURE ON CLAIMS.

WHEN a claim to a peerage is to be made, the proper mode of making it is (*supra*, p. 10) by petition to the Crown. Such a petition should be framed with great care and circumspection, for although it is possible to make good errors or omissions, or even to take up a new position by a supplemental petition, it is far better that the case of the claimant should from the first be fully and accurately presented, especially as anything which the petitioner puts forward may be treated as an admission by him. (*Tracy Peerage Case*, 10 Cl. & Fin. 154.)

The petition should be addressed to the Crown—to the King's Most Excellent Majesty—and should state in what way the peerage claimed was originally created, whether by charter or patent, or by girding or by writ, and sitting thereon. It should further set out the facts which show that, according to the limitations of its creation, the peerage in question has descended to the claimant, or where the petitioner claims as a co-heir, the facts which show that the peerage is in abeyance and that the claimant is one of the co-heirs and who are the other co-heirs.

The facts relied on should be set out in considerable detail. It is not enough to state generally that the peerage claimed has descended to the claimant; the line of descent must be traced. The petition may, as regards questions of law arising on the facts, state that the petitioner is advised to this or that effect.

The petition should conclude with a prayer that the claimant may be declared entitled to the peerage (*Huntly Peerage Case*, 5 Cl. & Fin. 349), and may have a writ of summons, or if the petitioner claims as co-heir to the peerage, then that he may be declared to be a co-heir, and that the abeyance may be determined in his or her favour.

The petition is presented through the Home Office, and is in due course referred to the Attorney-General by a memorandum or note subjoined or indorsed and signed by the Secretary of State.

The reference is in the shape of an instruction to the Attorney-General to inquire into the truth of the allegations made by the petitioner, and to report thereon to his Majesty. The Attorney-

The petition
to the Crown.

Form of
petition.

Reference to
Attorney-
General.

Report. General, pursuant to this direction, investigates the claim, inspects the proofs, hears counsel if necessary in support of the petition, and in due course makes his report, in which he states the substance of the petition and the evidence adduced for or against the claim, and the conclusion at which he has arrived and the grounds of that conclusion, and very commonly suggests a reference to the House of Lords.

Reference to the House of Lords. It is open to the Crown, if it thinks fit, to act upon the report of the Attorney-General without referring the matter to the House of Lords, and to admit or reject the claim; but where, as is usually the case, there is any matter of doubt arising on the claim, the Crown refers the petition and the Attorney-General's report to the House of Lords, "to examine the allegations thereof as to what relates to the petitioner's title, and to inform his Majesty how the same shall appear to their Lordships."

Claimant's case. The House of Lords in its turn refers the matter to the Committee for Privileges, and before that Committee the claimant must proceed.

By the Standing Orders of the House of Lords, the Committee for Privileges is directed not to proceed to the hearing of any claim to a title of honour until fourteen days after printed cases shall have been delivered, which shall contain an abstract of the proofs and authorities upon which such claim may be founded, and the dates thereof, and references where the same may be found.

Its form. Accordingly, the claimant in due course prepares his case, which must state fully the facts as to the creation of the dignity and all other material facts by which the title is shown to be in the claimant. The position he takes must be clearly indicated, and must be in accord with his petition to the Crown. If, for example, his claim is based on the creation of the peerage by letters patent or charter, he cannot at the hearing turn round and claim that the creation was by writ. The case should state or refer in detail to the evidence by which each material fact is to be proved; and further, it is allowable to discuss and refute anticipated objections, and lay down and maintain propositions of law, and to cite cases in support. The pedigree of the claimant should be incorporated in or annexed to the case. The case must be signed by two counsel.

Case of opponent. Cases in opposition should plainly state the objections relied on, and refer in detail to the evidence in support, and, if needs be, an opponent will be allowed to present a supplement case.

Additional case of claimant. Where any unforeseen objections are made to the claim or any new matter is discovered by the claimant, he may petition the House for leave to present an additional case. This occurred in the *Norfolk Case*, (1907) A. C. 10.

Several claimants. If there are several claimants to the same dignity, the same course of petition to the Crown, report by the Attorney-General, reference to

the House of Lords, and delivery of a printed case, must be followed; but a person who merely opposes a claim without having himself petitioned the Crown is, of course, in a different position, and will be allowed to deliver a printed case in opposition to the claim, and to be heard by his counsel in support of such opposition. (*Braye Peerage Case*, 1839, 6 Cl. & Fin. 757.)

The proper course for a co-heir claiming a peerage in abeyance is to petition the Crown to terminate the abeyance in his favour, and this he can do though a rival petition has been presented by another co-heir for determination in his favour. But where there is a petition by one co-heir for a determination in his favour and another co-heir raises no competing claim, but is shown by the claimant's own case to have an interest, the House will, on such co-heir's petition, allow him to appear before the Committee for Privileges and present a case to protect his interest. (*Braye Peerage Case*, 6 Cl. & Fin. 757.)

Course where peerage in abeyance.

A claimant to a peerage in abeyance is bound to give notice to all the co-heirs known to him to be existing, and for this purpose notice by letter through the post is not sufficient. (*Camoy's Peerage*, 6 Cl. & Fin. 789.) Nor is this all. The claimant must deduce and prove the pedigrees of all the other co-heirs, in order that the Crown may know among what persons the dignity is in abeyance. (Cruise, chap. 6, s. 53; but see the *Braye Peerage Case* as to how far this goes.)

Notice of claim.

In due course a day is fixed on the application of the claimant for the hearing of the claim.

Day fixed for hearing.

At the hearing by the Committee for Privileges the claimant appears by his counsel, who state the case, and produce the evidence in support. This for the most part is generally documentary, but oral evidence is sometimes taken.

Procedure at hearing.

The Attorney-General, on behalf of the Crown, attends to examine the evidence produced by the claimant, and to take such objections to the case and pedigree as he may be advised, and, if he thinks proper, to adduce evidence in opposition. As guardian of the legal rights of the Crown and privileges of the peerage, it is the Attorney-General's duty to see that no one is admitted to the peerage who does not prove a clear and equitable title to the dignity.

As to who may be heard in Opposition.

When the Earl of Crawford claimed the Dukedom of Montrose, the then existing Duke of Montrose petitioned to be heard against the claim on the ground that his precedence in the peerage would be affected, and he was allowed to present a case, and the Committee reserved the question whether he should be heard. In the end it turned out to be unnecessary to hear him. In that case Lord Cran-

Montrose Case.

worth said, "I should advise your Lordships that we cannot hear a person who does not claim a peerage in opposition, or who merely says that the proof and establishing of it will collaterally affect his interests." (See Lord Lindsay's Report of the *Montrose Case*, published in 1854; also the report in 1 Macq. 424.)

*Shrewsbury
Case.*

In the *Shrewsbury Peerage Case* (7 H. L. C. 1), a claim was made to a peerage which had an estate annexed to the title. Certain persons would, if the peerage became extinct, be entitled to the estate; if the claim to the peerage was established their title would be defeated. They were allowed to appear and be heard in opposition to the claim. The resolution of the Committee in that case was to the following effect: "That the opposing petitioners be allowed to lodge one case in common in opposition to the claim of the claimant, and that another opposing party be allowed to lodge a separate case in opposition to the said claim, the said cases to state fully the grounds upon which the petitioners rely in opposition to the said claim, and to be laid upon the table of the House on or before a day specified (that is, about ten days later), and that in the meantime, the claimant consenting by his counsel, the said petitioners be allowed to appear at the bar by counsel, and to cross-examine the witnesses examined in support of the claim."

Notice to
others.

Where the Committee apprehend that any other person may have a right to the peerage claimed, they may direct the claimant to give notice to such person.

*The Norfolk
Peerage Case.*

In the *Norfolk Peerage Case* (1907, A. C. 10) a claim was made by Lord Mowbray to the ancient Earldom of Norfolk, created in the year 1313, and the Duke of Norfolk, who held an Earldom of Norfolk created in the year 1644, petitioned the House of Lords for liberty to appear and be heard against the claim of the petitioner. His Grace did not set up any title to the Earldom claimed by the petitioner, but based his claim to oppose rather on the ground that, having regard to the circumstances and manner in which the Earldom of Norfolk was granted to his ancestor, the Crown should not now call out of abeyance another earldom bearing the same name, and acting on these considerations the House gave the duke liberty to appear and to lodge a printed case, and said that he might be treated as Earl of Norfolk under the creation of 1644.

Consulting
the judges.

If upon the hearing of a peerage case any difficulty arises as to a matter of law, the House of Lords is entitled to summon the judges to advise the House, but it is under no obligation to take this course, and as we have seen in the *Wensleydale Case* (*supra*, p. 87), it declined to submit the question to the judges.

On the conclusion of the claimant's case, any opponents entitled to be heard by counsel, and the Attorney-General, will be heard. The

Committee then comes to a resolution which is reported to the House, and if agreed to, the Crown is informed of it pursuant to the order of reference. The Committee's conclusion.

The resolution, if in affirmance of the claimant's right, is in some such terms as these: "That the petitioner is entitled," or, "That the title to the barony doth of right belong to the petitioner, to him and his heirs." If the decision is adverse, the resolution takes such form as this: "That it doth not appear that the petitioner is entitled to the dignity," or, "That the petitioner is not entitled to the dignity claimed by him."

Reverting now to the matters material to be proved on a claim to a peerage, they are these:— What to be proved.

- (1.) The creation of the peerage and the limitations of the dignity.
- (2.) That the title under such limitations has vested in the claimant, or if he claims as a co-heir that he is such co-heir.

As to (1) the best proof of the grant by charter or patent is the production of the original charter or patent, such an instrument being in itself a record. If the original cannot be found, the record thereof in the patent or charter rolls is admitted, or an examined copy. Charter or patent.
(Taylor, Ev. § 1526.)

Where a patent of peerage cannot be found recorded in the Patent Rolls or elsewhere in the records, other evidence must be resorted to. Thus, entries in the Journals of the House of Lords evidencing the limitations of the patent may be referred to for that purpose. (Barony of Saye and Sele, 1 H. L. C. 507.)

As to proof of writ and sitting in Parliament, see *supra*, p. 46. The proof must be by the records of Parliament; see also Cruise, chap. 6, para. 47. (Hubback, p. 613.) The Sitting.

Various facts may be proved by public registers or books kept by persons in public offices, in which they are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties, and under their personal observations. (Taylor, § 1591; Hubback, p. 469.) Public registers.

Thus, parish registers, registers of births, marriages, and deaths, made pursuant to the Registration Act (6 & 7 Will. IV. c. 86), and any other register, are admissible, but to render any document admissible in evidence as an official register it must be one which the law requires to be kept for the public benefit (Taylor, § 1592), and as a rule it is essential to the official character of such registers that the entries in them be made promptly, or at least without such long delay as to impair their credibility. (Taylor, § 1594; Hubback, p. 469.) Parish register.

Although official registers are admissible in evidence of the facts they record, this is only as regards facts required by law to be recorded. Thus, a marriage register is evidence not only of the

marriage, but of the time of its celebration, for it was the duty of the registrar to state the facts correctly in the register. (Taylor, § 1774.) The register of births is evidence of that fact and of its date, but it furnishes no proof of the age of the party, save that he was born at such a date, even though it states the day of his birth.

Inquisitions. Inquisitions *post-mortem* are admissible on the ground that they were made under competent authority concerning matters in which the public is interested. They have frequently been admitted in peerage cases in proof of deaths, and also of the name, age, and identity of the next heir. (Hubback, p. 584.)

Heralds' books. Visitation books deposited at the Heralds' College, containing as they do the pedigrees and coats of arms of many noble and gentle families in England, which were compiled during the sixteenth and seventeenth centuries by heralds, acting under commissions from the Crown, have frequently been admitted in peerage cases (Taylor, § 1769; Hubback, 538 *et seq.*); but where it is not shown that the document or book was made under such commission, or as a matter of public duty, it is not admissible in evidence as a public document.

The difficulty of proving a pedigree. To prove a pedigree effectively, if it be a long one, may be a matter of great difficulty; such a pedigree involves the proof of many facts, and in regard to a large number of these facts the witnesses may long since be dead. Suppose, for example, the claimant's pedigree should set out that A., the original grantee of the peerage in tail male, was married to B., that A. and B. had three sons, C., D., and E., that C., D., and E. each married and had issue, that some generations later the issue male of C. and D., the elder sons, became extinct, that E. married and died leaving issue, and that the claimant is the heir male of the body of A. through E. To prove such an array of allegations as these may be a task of great difficulty. To begin with, the marriage of A. and B. has to be proved; nor is that enough, it must be shown that A. did not leave issue by any former wife. The birth of each of the three sons, C., D., and E., must be proved, their respective marriages, and the birth of their respective male issue. Proof must be given of the extinctions of the issue male of C. and D., of the marriage of E., and the birth of male children of the marriage of E., and of all the other facts requisite to show that the claimant is the heir male of the body of E.

Questions of identity. At every turn, too, questions of identity arise: for example, proof of the marriage of A. and B. is adduced—this must include proof of the identity of the spouses. Proof of the death of C. is produced; here, again, it is not enough to show that a person named C. died at a particular date, the person so claiming must be identified with the C. of the pedigree. And so with all persons figuring in the pedigree, the

establishment of identity is an essential element in the proof. (See Hubback, 438.)

In pedigree matters the law relaxes to some extent its rules of evidence, and admits declarations of deceased persons, and by pedigree matters is meant all material facts which, if established, would tend to prove the pedigree on which a claim rests. Declarations of deceased members of family.

For hearsay evidence to be admissible in such cases the declaration on which it is based must be shown to have proceeded from the person related by blood or marriage to the family, and, therefore, presumably, having special means of knowledge, and must also be shown to have been made *ante litem motam*—that is, before any controversy in regard to the matter arose. (See Taylor, Ev. §§ 635, 636, 638; Hubback, 660.)

The relationship of the declarant with a family must be established by some proof independent of the declaration. (See Taylor, § 640.)

Such declarations by deceased persons may be either (1) oral, as where A. proves that B., a member of the family, told him so-and-so in regard to the pedigree; or (2) in writing, as where the declarant, in his will or in any other deed or document, makes a declaration as to the pedigree or some fact therein. (Taylor, Ev. § 648.)

Hearsay upon hearsay is also admissible; for example, evidence that the deceased father of the claimant told him or someone else some fact in relation to the pedigree which had been related to him by his father or grandfather, or some other member of the family, is admissible in evidence in a pedigree case. (See Taylor, § 639.)

Family conduct is admissible in evidence in pedigree matters, as where it is shown that a person in the pedigree was treated as a legitimate son. (Taylor, Ev. § 649.) Family conduct.

Entries by a parent or relation in Bibles, prayer-books, missals, almanacks, or in any other book, or any document or paper stating the fact and date of birth, marriage, or death of a child, or other relation, are also admissible in evidence as the written declarations of the deceased persons who respectively made them (Taylor, Ev. § 650), and such entries, when made in a family Bible or Testament, will be admissible, even without proof that they have been made by a relative, the presumption being that the whole family have more or less adopted the entries contained in the book, and thereby given them authenticity. (*Berkeley Peerage*, 4 Camp. 421; Taylor, Ev. § 552.) Entries in Bibles, &c.

The correspondence of deceased members of the family is, on proof of the handwriting, admissible in evidence; so are recitals in marriage settlements, and other family deeds, and descriptions in wills and other documents. (*Tracy Peerage*, 10 Cl. & Fin. 154; Taylor, Ev. § 651.) Other declarations in writing.

Inscriptions. Inscriptions on tombstones, coffin-plates, mural monuments, family portraits, engravings on rings, hatchments (see *infra*), and the like, are also admissible, either as declarations by members of the family or on the ground of having received tacit recognition by the family. For the same reason a pedigree, whether in the shape of a genealogical tree, map, or chart, or contained in a book, or in a mural or monumental inscription, and recognized by a deceased member of the same family, is admissible, however early the period from which such pedigree purports to be deduced. (Taylor, Ev. § 656.)

Evidence of marriage. Marriage should be proved by the evidence of some witness present at the ceremony. If this is impracticable by reason of the death of the witnesses, the marriage may be proved by the record thereof entered in the public register, on the principle that it is the duty of the person who keeps the register to make proper entries after satisfying himself of their truth (see *Sturla v. Freccia*, 5 App. Cas. 623, 644; *Lyell v. Kennedy*, 56 L. T. 647); but the identity of the parties must be proved. In the absence of the marriage register a marriage may be proved by declarations made by members of the family.

Failing any of the above kinds of evidence, evidence of general reputation or opinion is admissible in proof or disproof of marriage. (Taylor, Ev. §§ 172, 578; Stephen, Dig. Ev. Art. 53.) Thus, where it is alleged that two persons named in the pedigree were married, the opinion expressed by conduct of their acquaintances and friends is admissible in evidence. (*Morris v. Miller*, 2 Burr. 2057; Stephen, Dig. Ev. Art. 53.)

There is always by English law a presumption in favour of the validity of a marriage which is shown to have been celebrated *de facto* (Taylor, Ev. § 172); and marriage may even be presumed from habit and repute. (Taylor, Ev. §§ 172, 578.)

Evidence of legitimacy. There is a strong presumption in favour of the legitimacy of a child born in wedlock. (*Legge v. Edmonds*, 25 L. J. Ch. N. S. 125; Taylor, § 106.) The presumption is not irrebuttable, but the evidence to rebut it must be clear and conclusive, and not resting merely on the balance of probabilities. (*Aylesford Peerage Case*, 11 App. Cas. 1; *Bosville v. Att.-Gen.*, 12 P. D. 177.)

Parents cannot give evidence of the legitimacy of their children by proving who the real father of the child was, but their acts and conduct may be adduced in evidence. (See *Morris v. Davies*, 5 Cl. & Fin. 163, and the cases above referred to.)

Evidence *de bene esse* as to illegitimacy before the hearing. In the *Saye and Sele Peerage Case*, 1848 (1 H. L. C. 507), the claimant presented a petition claiming the peerage, which was referred to the Attorney-General, who reported that the evidence laid before him was

sufficient, provided it should be proved that a certain child therein mentioned was illegitimate by reason of the non-access of the husband, and he advised the Crown to refer the petition to the House of Lords, adding that, as the case depended entirely on the evidence of Mr. Stein, who was of great age, it was important to the claimant that his examination should be taken at the earliest possible opportunity. The petition having been referred to the House of Lords, and the Committee for Privileges considering that the claimant had not time to prepare and lay his case before the House in that session (1847), appointed an early day for Mr. Stein's examination *de bene esse*, and he was examined accordingly, and his evidence was ordered to be printed. Later on the claimant presented his printed case to the House, and Mr. Stein again attended as a witness, but the Committee, having his former evidence before them, dispensed with his examination *de novo*.

In peerage cases admissions are not to be treated as dispensing with evidence; the facts must be established by proper affirmative evidence. Admissions.

As to the circumstances in which the Committee for Privileges will receive in evidence printed minutes and proceedings before a former Committee upon the same peerage, see the *Beaumont Peerage Case*, 1840 (6 Cl. & Fin. 868). The peerage in that case was a barony by writ created in the time of Edward II. In 24 Hen. VII. the barony fell into abeyance. In 1797 one of the co-heirs petitioned that the abeyance might be determined in his favour, and the matter was fully examined into by the Committee for Privileges, and a resolution passed that the peerage was in abeyance, and that the petitioner was one of the co-heirs. The abeyance was not, however, determined, and subsequently the peerage again fell into abeyance. In 1840 a co-heir presented a fresh petition that the abeyance might be determined in his favour, and the question arose whether the minutes and proceedings on the former claim could be put in evidence. The Committee for Privileges were of opinion that, the case having been twice before the Committee for Privileges, it was unnecessary to repeat the evidence given on those occasions; that it might be entered as read, and reprinted together with the proceedings on the pending petition. Evidence in
previous
proceedings.

An ancient barony by writ, after having been held by the descendants of the original grantee for several centuries, fell into abeyance, but was afterwards claimed and obtained by A., who, upon full investigation before the Committee for Privileges, was found to be heir of the first and last barons. Afterwards the barony again fell into abeyance amongst A.'s co-heirs, and one of these co-heirs claimed to have the abeyance determined in his favour. He did not, however, rely on the evidence laid before the Committee in 1667, 1668, and 1669, but with

what the Solicitor-General seems to have thought excessive caution proved his title from the creation of the dignity. "I apprehend," said the Solicitor-General in his argument, "there is no doubt whatever that it is a barony of the description contended for by the claimant. I think it is also proved by the proceedings in your Lordships' House upon the claim of Benjamin Mildmay in 1667, 1668, and 1669. Indeed, I think the claimant might have almost commenced his evidence from those proceedings; but he has gone further, and proved the creation of the title in the reign of Edward I., and he has, I think, deduced it clearly down to Benjamin Mildmay, who established the claim in 1669. There is no doubt whatever that that claim was in respect of the title which was created in the reign of Edward I., for that is proved by the subsequent proceedings in this case which ultimately resolved themselves into this, that he consented to take his seat in your Lordships' House as the junior baron of the reign of Edward I." (*Fitzwaller Peerage Case*, 10 Cl. & Fin. 946.)

APPENDIX

OF

CHARTERS, LETTERS PATENT, &c.

(For the most part Translated.)

Creation of Geoffrey de Mandeville as Earl of Essex— Charter, Cotton MSS. Brit. Mus.

STEPHEN, King of the English, to His Archbishops, Bishops, Abbots, **No. 1.**
 Earls, Judges, Barons and Sheriffs and all his Ministers and faithful *5 Stephen,*
 subjects, French and English, of the whole of England, greeting. *1140.*
 Know that I have made Geoffrey de Mandeville, Earl of the County
 of Essex, hereditarily, wherefore I will and grant and firmly direct
 that he and his heirs after him by hereditary right shall hold of me
 and my heirs well and in peace and as freely and honourably as other
 Earls of my land hold the earldoms whence they are Earls with all
 dignities and liberties and customs with which my other Earls hold.

Witnesses—William de Ipra and Henry de Essex and John
 son of Robert [and others] at Westminster.

The charter, of which the above is a translation, is preserved amongst the Cotton MSS. in the British Museum. The seal is missing and the charter is undated, but Mr. Round, in his *Geoffrey de Mandeville*, gives a fac-simile, and at p. 51 shows that the charter was probably executed in 1140. (See also Dugdale's *Baronage*, I. 201.) It is specially notable in that it is the most ancient charter of an earldom extant, and that the grant is in fee simple, and that the charter says nothing about the third penny of the pleas, or about girding with the sword, as in many subsequent charters creating or recording the creation of earldoms. (See further as to this charter, R. C. third Report, 162.)

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R

**Creation or Confirmation of Geoffrey de Mandeville
as Earl of Essex—Charter, R. C. V. 1.**

No. 2.
Maud the
Empress,
6 & 7 Stephen,
1141.

I, Maud, daughter of King Henry and of the English Lady, give and grant [do et concedo] to Geoffrey de Mandeville for his services and to his heirs after him hereditarily that he shall be Earl of Essex and have the third penny of the Pleas of the County as an Earl ought to have in his County. [Then follows a grant of lands. Witnesses. Then follow the names of the witnesses at Westminster.]

This is a translation of the charter, as set out in Selden's Titles of Honour, second edition, 647, and R. C. V. 1, but the words, no doubt, represent only the central portion of the charter of Maud. The original has been lost, and there are various extracts or copies, more or less imperfect, in existence. And Mr. Round, in his Geoffrey de Mandeville, has laced them together and reconstructed the charter, and shown that it was probably executed in the latter half of 1141. It is especially notable in that the grant is expressed in the present tense, and that this is the first charter known in which the third penny is mentioned. (See further, R. C. third Report, 162.)

**Creation of Milo of Gloucester as Earl of Hereford—
Charter, R. C. V. 1.**

No. 3.
6 & 7 Stephen,
1141.

Matilda, the Empress, daughter of King Henry and Lady of the English, to her archbishops, bishops, abbots, earls, barons, justices, sheriffs, reeves, ministers, and all her faithful people, French and English of all England, greeting: Know ye that I have made Milo of Gloucester Earl of Hereford, and have given him the moat of Hereford with the whole castle in fee and inheritance to him and his heirs to hold of me and my heirs.

I have given him also the third penny of the rent of the borough of Hereford whatsoever it ever may render, and the third penny of the pleas of all the county of Hereford.

I have given him also three manors in the same county of my demesne, that is to say, Mawerdina and Luggewordina and Wiltona, with all their appendages.

I have given him also the Hay of Hereford and the forest of Trinela with that which to it pertains.

I have given him also the service of Robert de Chanados and Hugh

FitzWilliam and Richard de Cormeill and all their fees wheresoever they may have them.

And I have given also and granted all these abovesaid things in fee and inheritance to him and his heirs to hold of me and my heirs.

And this gift I made him at Oxford on the feast of St. James the Apostle, that is to say, on the eighth day before the feast of St. Peter ad Vincula, for his service which he had done to me, and because I then had in my keeping at Bristol King Stephen who by the mercy of God and the aid of Robert Earl of Gloucester, my 'brother, and the aid of the same Milo and other my barons, was taken in the battle at Lincoln on the feast of the Purification of St. Mary next before the aforesaid feast of St. James the Apostle.

Wherefore I will and firmly command that he and his heirs may hold all the abovesaid things of me and my heirs so well and in peace honourably and fully and freely and quietly in wood and plain, in forest and chaces, in meadows and pastures, in waters and mills, in pools and vivaries, in ways and streets, in markets and fairs within borough and without, in the city and without, and in all places with soc and sac and toll and theam and infangenethef, and with all customs and liberties and quittances as ever any Earl better and more honourably and quietly and freely and more fully holds any tenement or lordship of me in England or ever held of any my ancestor. These being witnesses Theobald Archbishop of Canterbury, Robert Bishop of London, Alexander Bishop of Lincoln, Bernard Bishop of St. David's, Nigel Bishop of Ely, David King of Scotland, Robert Earl of Gloucester, Reginald, Earl of Cornwall, Robert son of Reginald, Brientius son of the Earl Humphrey de Bohun, Alexander de Buch, John son of Gislebert, Marshal Payn de Clarival, Robert de Curceo, Ralph Paganel, William de Doura, Elias Giffard, Walken Maminot, Arnulf de Hesding, Gislebert de Lascy. At Oxford.

Mr. Round in his *Geoffrey de Mandeville*, p. 96, notes this (1141).

Creation of Hugh Bygot as Earl of Norfolk—Charter, R. C. V. 2.

Henry, King of the English, Duke of Normandy and Aquitaine and Earl of Anjou. To Archbishops, Bishops, &c. and all his faithful men both French and English of the whole of England and Normandy, greeting. Know that I have made Hugh Bigot, Earl of Norfolk, that is to say, with the third penny of Norwich and Norfolk, and I

No. 4.
Hen. II.

will and enjoin that he and his heirs shall hold as freely and quietly and honourably of me and my heirs as any other Earl well and freely holds his Earldom.

Witnesses—

This is translated from the copy of the record set out in R. C. V. p. 2. Third Report, pp. 165, 183.

Creation of Alberic or Aubrey de Vere as Earl of Oxford—Charter, R. C. V. 3.

No. 5.
Hen. II.

Henry, King of England and Duke of Normandy and of Aquitaine and Earl of Anjou. To archbishops, etc. and to his faithful men of the whole of England and France. Know that I have given and granted to Earl Alberico in fee and inheritance the third penny of the Pleas of the County of Oxford, so that he may thence be Earl; wherefore I will and firmly enjoin that he and his heirs shall thence have his Earldom as freely, peaceably and honourably as any Earl of England has his Earldom.

Witnesses, &c.

This is translated from the charter set out in Selden, second edition, p. 651, and in R. C. V. 3. See also R. C. third Report, p. 166.

Creation or recognition of William de Arundel as Earl of Arundel—Charter, R. C. V. 3.

No. 6.
1 Rich.
1189 or 1190.

Richard, King of England, Duke of Normandy and of Aquitaine, Count of Anjou, to archbishops, bishops, &c., greeting. Know that I have given to William, Earl of Arundel, the castle of Arundel, with the whole honour of Arundel and with all the appurtenances. To hold to him and his heirs of me and my heirs in fee and inheritance and the third penny of the pleas of Sussex whence he is Earl [*unde comes est*], wherefore I will and firmly command, &c.

Witnesses, &c. Dated .

**Creation of Henry de Bohun as Earl of Hereford—
Charter in relation to creation, R. C. V. 4.**

John, by the grace of God, &c. Know ye that we have given and granted and by this present charter have confirmed to Henry de Bohun twenty pounds of the third penny of the County of Hereford yearly to be received, whereby we have made him Earl [*unde cum fecimus comitem*] of Hereford, and he has made his charter to us that neither he nor his heirs will ever claim anything from us or our heirs whom we have by our wedded wife by the charter of King Henry our father which he had in this form:—Henry King of England (&c.). These being witnesses—G. Bishop of Winchester, and H. Bishop of Salisbury, G. Fitz Piers Earl of Essex, L. Earl R. le Bigot, William Brewer. Given, &c. **No. 7.**
1 John, 1200.

As to this charter, see R. C. third Report, p. 163.

**Creation of William Ferrars as Earl of Derby,
R. C. V. 5.**

John, by the grace of God King of England, Lord of Ireland, &c. Know ye that we have rendered and granted by this present charter have confirmed to our beloved William de Ferrars, Earl of Derebi, the third penny of all the pleas pleaded by our Sheriff in the whole County of Derebi, as well in Derebi as without, whence [*unde*] he is Earl as any one of his ancestors ever best held it. To hold to him and his heirs of us and our heirs for ever. And we have with our own hand girded him as Earl with a sword. These being witnesses (&c.). **No. 8.**
1 John, 1200.

As to this charter, see R. C. third Report, 167.

**Creation of Saiker de Quincy as Earl of Winchester—
Charter in relation to, R. C. V. 5.**

John, by the grace of God King of England, &c. Know ye that we have given granted and by this our present charter have confirmed to Saiker de Quenci, Earl of Winchester, ten pounds to be received to him and his heirs of us and our heirs every year out of the issues of the County of Southampton by the hand of the Sheriff of Southampton **No. 9.**
1 John, 1200.

at Winchester by the name of Earl [*nomine comitis*], to wit, payable at Easter 100 shillings and at the feast of Saint Michael 100 shillings. Wherefore we will and firmly command that the aforesaid Saiker and his heirs shall receive and have the aforesaid ten pounds well and in peace freely and quietly and honourably for ever as it is aforesaid. Witnesses (&c.).

See as to this charter, R. C. third Report, 168.

Earldom of Warwick—Extract from Close Rolls as to third penny, R. C. V. 6.

No. 10.
15 John, 1213. Edward, &c. to the Sheriff of Warwick, &c. We command you that you cause Henry, Earl of Warwick, to have the third penny of the County of Warwick as his ancestors have been accustomed to receive it. Witness ourself at Wingham, the 1st day of June.

Earldom of Devon—Extract from Close Rolls as to third penny, R. C. V. 6.

No. 11.
3 Hen. III.
1219. It is commanded to the Sheriff of Devon that he cause Fawkes de Breauté to have the third penny of the County of Devon as William, Earl of Devon, was accustomed to receive it by the name of Earl, with the arrears from the time when the wardship of the said Earl came into the hand of the same Fawkes by our command. Witness, as above [at Westminster, the 19th day of June, in the third year, &c.].

Creation of Hubert De Burgh as Earl of Kent—Charter in relation to, R. C. V. 6.

No. 12.
11 Hen. III.
1226—7. Henry, King, &c. to Archbishops, &c. Know ye that we have given, granted, and by this our present charter have confirmed to our beloved and trusty Hubert de Burgh fifty pounds sterling yearly for [pro] the third penny of the County of Kent by the name of Earl of Kent, of which County we have made the same Hubert Earl; to be received yearly by the hand of the Sheriff of Kent at two terms of the year, that is to say, at Easter 25*l.* and at the feast of St. Michael 25*l.* Wherefore we will and firmly command that the said Hubert, Earl of Kent, and his heirs begotten of Margaret his wife, sister of Alexander, King of Scotland, shall have the aforesaid 50*l.* sterling of us and our heirs as it is aforesaid.

Witnesses, &c.

**Creation of Hubert De Burgh as Earl of Kent—Extract
from Close Rolls as to Third Penny, R. C. V. 7.**

Henry, King, &c. to the Sheriff of Kent, greeting. Know you that **No. 13.**
 we have given, granted, and by our charter have confirmed to our 11 Hen. III.
 beloved and trusty Hubert De Burgh, Earl of Kent, our justice for his 1226—7.
 homage and service the Manors of Ofspring and Estbrugge, with all
 their appurtenances, to be had and held as our charters, which we
 have caused to be made to him thereof, fully testify. We have also
 given and granted, and by this our charter have confirmed, to the same
 Earl fifty pounds yearly for [pro] the third penny of the County of
 Kent, by the name of Earl of Kent, of which County we have made
 the same Hubert Earl, to be received yearly by the hand of the
 Sheriff of Kent, that is to say, at Easter 25 pounds and at the feast of
 Saint Michael 25 pounds. We have also given and granted, and by
 our charter have confirmed, to him the homage and all the service of
 Henry De Ver, which he owed to us for the land of Homchild which
 be held of us in your county, to be had and held as our charter
 which he has thereof more fully testifies. And therefore we command
 you that you cause him to have full seisin of the aforesaid manors
 with their appurtenances, and with the homage and service of the
 aforesaid Henry; and that you cause him to have the aforesaid fifty
 pounds yearly every year; as it is aforesaid. Witness as above
 [the King, at Westminster, the 19th day of February].

**Earldom of Sussex or Arundel—Extract from Close
Rolls as to Annuity, R. C. V. 7.**

Henry, King, &c. to the Sheriff of Sussex. We command you that **No. 14.**
 you cause the Keeper of the heir of the Earl of Arundel to have the 11 Hen. III.
 20 marks by the year which the Earls of Arundel, predecessors of the 1226—7.
 same heir, have been accustomed to receive by the year by the name
 of the Earldom of Sussex. Witness ourself, &c.

**Creation of the King's Brother as Earl of Poitou and
Cornwall—Charter, R. C. V. 7.**

No. 15. Henry, King, &c., greeting. Know ye that we have given, granted, and by this our charter have confirmed, to our beloved brother, the Earl of Poitou and Cornwall, all the County of Cornwall, with the stannary of Cornwall and all mines and other appurtenances of the same County and of the stannary aforesaid. To have and to hold of us and our heirs to the same Earl and his heirs, doing therefor to us and our heirs the service of five knights' fees for all service and all custom and all demand. Wherefore we will, &c.

15 Hen. III.

See R. C. third Report, p. 136.

**Creation of Edmund, the King's Son, as Earl of
Lancaster—Charter, R. C. V. 8.**

No. 16. Henry, &c. to Archbishops, &c., greeting. Know ye that we have given and granted, and by this our present charter have confirmed, to Edmund, our very dear son, the Honor, County and Castle, and Town of Lancaster, and all our demesnes which are in our County of Lancaster, with the vaccaries and forests of Wiresdale and Lonnesdale and Newcastle-under-Lyme, and the Manor, Castle and Forest of Pykering, and our Town of Gommecestre, and our rent of the Township of Huntindon, with all their appurtenances, to be had and held to the same Edmund and the heirs of his body lawfully begotten of us and our heirs, with knights' fees, advowsons of churches, chases, liberties, customs, and all other things to the Honor, County, Castles, Towns, demesnes, vaccaries, forest, and rent aforesaid appertaining, doing to us and our heirs the services therefor due and accustomed. So that we will not disseise, nor permit to be disseised thereof, the aforesaid Edmund or his heirs aforesaid until we shall have made to him a reasonable exchange in other our lands to the value of the Honor, County, Castles, Towns, demesnes, vaccaries, forests, and rents aforesaid. So also that if the aforesaid Edmund shall die without heirs of his body lawfully begotten, the Honor, County, Castles, Towns, demesnes, vaccaries, forests, and rents aforesaid, with the appurtenances, shall wholly revert to us or our heirs. Wherefore we will, &c., as it is aforesaid. These being witnesses (&c.).

51 Hen. III.
1267.

Tail general.

See R. C. third Report, p. 136.

**Creation of Piers de Gaveston as Earl of Cornwall—
Charter, R. C. V. 12.**

Edward, &c. to Archbishops, Bishops, Abbots, Priors, Earls, Barons, Justices, Sheriffs, Reeves, ministers and all his bailiffs and trusty people, greeting. Know ye, that we have given, granted and by this our charter have confirmed to our beloved and trusty Piers de Gaveston, knight, all our County of Cornwall, with the castles, towns, manors, hundreds (&c.) . . . which were of Edmund, formerly Earl of Cornwall, in the County aforesaid. We have also given and granted to the aforesaid Piers our Castle and Manor of Lideford (&c.) . . . To have and to hold to the same Piers and his heirs with all things to the aforesaid County, Castles, Manors, Towns, Honors, lands and tenements, Hundreds, office of Sheriff, Stannary, mines and chases appertaining as it is aforesaid for ever, as entirely as they came to the hands of the Lord Edward of famous memory, formerly King of England, our father; doing to us and our heirs the service of three Knights' fees for all service to us and our heirs therefor appertaining, &c. Wherefore we will and firmly, &c.

No. 17.

1 Edw. II.
1272—3.

There was no separate creation of the earldom, but this was probably girding. (R. C. third Report, 173.)

**Grant to the King's Brother of the surrendered
Earldom of Norfolk—Charter, R. C. V. 17.**

Edward, King of England, Lord of Ireland, and Duke of Aquitaine, to Archbishops, &c., greeting. Know ye that we have given, granted and by this our charter confirmed to Thomas de Brotherton, our very dear brother, all the right and honour and lordship which Roger le Bygod, formerly Earl of Norfolk and Marshal of England, had by the name of Earl, in the County of Norfolk, and which came to the hands of the Lord Edward of famous memory, formerly King of England, our father, by the grant, surrender, remise, and quit claim of the same Earl, and are in our hand. To have and to hold to the same Thomas and his heirs of his body lawfully begotten of us and our heirs with all and singular things thereto belonging by whatsoever name they may be called, as entirely as the aforesaid Earl had and held them on the day of the grant, surrender, remise, and quit claim aforesaid for ever. And if it happen that the aforesaid Thomas shall die without heir of his body lawfully begotten, then after the decease of the same Thomas the aforesaid right, honour and lordship, with all their appur-

No. 18.

6 Edw. II.
1313.

tenances, shall wholly revert to us and our heirs. Wherefore we will and firmly command for us and our heirs that the aforesaid Thomas shall have and hold to him and his heirs of his body lawfully begotten the aforesaid right, honour and lordship which the aforesaid Earl had by the name of Earl in the County aforesaid and which came to the hands of our said father by the grant, surrender, remise and quit claim aforesaid, and are in our hand of us and our heirs, with all and singular things thereto belonging by whatsoever name they may be called as entirely as the aforesaid Earl had and held them on the day of the grant, surrender, remise and quit claim aforesaid for ever. And if it happen that the aforesaid Thomas shall die without heir of his body lawfully begotten, then after the decease of the same Thomas the aforesaid right, honour and lordship, with all their appurtenances, shall entirely revert to us and our heirs as it is aforesaid. These being Witnesses, &c. Given under our hand at Westminster, the 16th day of December.

This charter was held quite recently to be invalid, on the ground that it only purported to grant the surrendered earldom, and that as the surrender was invalid the grant was also invalid. (*Norfolk Peerage Case*, (1907) A. C. 10.)

Creation of the King's Brother, Edmund of Woodstock, as Earl of Kent—Charter in relation to, R. C. V. 17.

No. 19.
15 Edw. II.
1321.

Edward, &c. to all to whom, &c., greeting. Know ye that we, being desirous of augmenting the honour and advantage of our beloved and trusty Edmund de Woodstok, our very dear brother, have given and granted to him, for us and our heirs, thirty pounds out of the issues [*de exitibus*] of the County of Kent, to be received by the hands of the sheriff of that County who for the time shall be, under the name and honour [*sub nomine et honore*] of Earl of Kent, and we have girded our same brother with a sword as Earl of the County aforesaid. We have also given and granted for us and our heirs to our said brother the farms and Hundreds underwritten; that is to say, the farm of the Royalty and Market of Derteford, with the appurtenances, in the County of Kent, to the value of thirty pounds by the year, the Hundreds of Littlefeld (&c.). . . . To have, hold and receive to the aforesaid Earl, our brother, that is to say, the aforesaid thirty pounds yearly out of the issues of the said County under the name and honour of Earl of Kent, as it is said, and the remaining farms and Hundreds for the whole of his life, of us, and our heirs, rendering therefor to us

and our heirs at our Exchequer eleven pounds, fifteen shillings and ninepence, which, according to the valuation aforesaid, exceed the sum which we have thought good at present to grant to him in augmentation of his honour; that is to say, one moiety at our Exchequer of Saint Michael, and the other moiety at our Exchequer of Easter. Saving to us and our heirs tallages in the places aforesaid if we or our heirs in the lifetime of the said Earl shall cause our demesnes to be tallaged. So also that after the decease of our aforesaid brother the farms and Hundreds aforesaid shall entirely revert to us or our heirs. In witness whereof, &c. Witness the King, at Westminster, the 28th day of July.

[See R. C. fourth Report, 271.]

In their fourth Report the Redesdale Committee, referring to the terms of the above charter, point out that it does not purport to grant the dignity, and that the dignity would seem to have been created by girding, and they infer, from the proceedings in Parliament in 4 Edw. III. and from the subsequent descent, that the girding was considered as having created an earldom to the grantee and his heirs generally. (See R. C. fourth Report, 289, 301.)

Creation of Andrew de Hartcla Earl of Carlisle— Charter, R. C. V. 18.

Edward, &c. to all to whom, &c., greeting. Know ye that for the good and laudable service which our beloved and trusty Andrew de Hartcla has lately rendered to us in conquering Thomas, then Earl of Lancaster, and others his adherents our subjects, enemies and rebels, and with the aid of Divine clemency rendering them so conquered to us, we have given and granted to him for us and our heirs twenty pounds out of the issues of our County of Cumberland, by the hands of the Sheriff of that County who for the time shall be, to be received and had to him and his heirs male of his body lawfully begotten, under the honour and name of Earl of Carlisle, and we have girded the same Andrew with the sword as Earl of the said place; And for the more abundant maintenance of such estate we have granted for us and our heirs to provide and assign to the same Andrew one thousand marks-worth of land and rent by the year, that is to say, five hundred marks-worth in the Counties of Cumberland and Westmerland and the liberties adjacent, and five hundred marks-worth in the March of

No. 20.

15 Edw. II.
1322.

Wales: to have and to hold to the same Andrew and his heirs male as it is aforesaid. Moreover we have granted to the same Andrew one thousand marks every year at our Exchequer at four terms of the year, that is to say, in the three weeks of Easter, in the quinzaine of the Nativity of Saint John the Baptist, in the quinzaine of Saint Michael, and in the octaves of Saint Hilary, to be received until we or our heirs shall cause the said one thousand marks-worth of land or rent by the year to be assigned to him. So nevertheless that when any portion of the said one thousand marks-worth of land or rent shall be assigned to him, then so much shall be deducted to him of the said one thousand marks at our Exchequer assigned to him as it is aforesaid. In witness whereof, &c. Witness the King, at Pontefract, the 25th day of March.

**Creation of Hugh Despenser Earl of Winchester—
Charter in relation to, R. C. V. 18.**

No. 21.

15 Edw. II.
1322—3.

Edward, &c. to Archbishops, &c., greeting. Know ye that we being desirous of augmenting the honour and advantage of our beloved and trusty Hugh le Despenser Senior for the good and lawful service which the same Hugh has hitherto rendered to the Lord Edward our father and to us and will render in future. Have given and granted and by this our charter have confirmed to him twenty pounds out of the issues of the County of Southampton, to be received every year by the hands of the Sheriff of that County who for the time shall be, under the name and honour of the Earl of Winchester, and we have girded the same Hugh with a sword as Earl of Winchester. We have also given and granted and by this our charter have confirmed to the same Hugh the Castle and Manor of Brymmesfeld (&c.). . . . So that after the death of the same Hugh the aforesaid twenty pounds yearly to be received out of the issues of the aforesaid County of Southampton under the name and honour of the Earl of Winchester and the said Castle Manors (&c.). . . shall remain to Hugh le Despenser Junior and his heirs, to be held of us and our heirs and other chief lords of those fees by the services abovesaid for ever. Wherefore we will and firmly command (&c.). . .

Remainder.

See R. C. third Report, 175.

Recognition of Sir Hugh de Courtenay as Earl of Devon—Extract from Rolls of Private Chamber as to, R. C. V. 26, *supra*, pp. 112, 123.

For Sir Hugh de Courtenay.

Edward, &c. to the Treasurer and his barons of the Exchequer, No. 22.
8 Edw. III.
1335.
greeting.

Our beloved and trusted Sir Hugh de Courtenay has shown us how that whereas he the said Hugh after the death of Isabel de Fort some time Countess Albemarle and Devon whose heir he is was seised by hereditary right of a certain yearly fee 18*l.* 6*s.* 8*d.* of the third pennies of the said County of Devon together with sundry other lands and holdings belonging to the said Countess, and whereas he received yearly by the hands of the Sheriff of that County 18*l.* 6*s.* 8*d.* and the same Sheriff had an allowance therefrom for their adjustment in regard to the exchequer before mentioned until Walter, lately Bishop of Exeter, at that time treasurer of our father Edward, lately King of England, officially notify that the aforesaid Hugh should allege that the said fee was given and allowed to the ancestor of the aforesaid Countess by our forebears with the name of earl, and that Hugh himself for the reason that he was not earl ought not to receive that fee. Then the Sheriff of the said County stopped allowing the aforesaid 18*l.* 6*s.* 8*d.* in his adjustment regarding the said exchequer, and on some pretext the Sheriffs of the same County have hitherto refused and do still refuse to pay the said annual fee to the same Hugh, and the pence of that fee which nevertheless he received thus by hereditary right are demanded back again from the same Hugh by summons of the said exchequer, and that Hugh caused himself to be restrained upon with great and heavy loss to be caused to him and manifest danger of being disinherited upon which he supplicated us to provide him a remedy, we wishing to be assured by you whether the aforesaid Hugh had received the said fees of 18*l.* 6*s.* 8*d.* by the hands of the Sheriffs of the County aforesaid for the time being, and whether the same Sheriffs had an allowance of it in making up their accounts at the said exchequer or not, and if so then at what times and in what sort and in what manner and in what cause the fee was withheld from the same Hugh, and if so what time and what sort of manner and similarly about the other times touching the said business we direct you to search the Rolls and memoranda of the said exchequer which in any manner whatever bear upon the matter, and to make inquest if needs be upon the premises, and fully and faithfully make return to us what you find concerning it under seal of the said exchequer clearly and openly.

Recognition of Sir Hugh De Courtenay as Earl of Devon—Extract from Close Rolls in Relation to, R. C. V. 27.

No. 23.
9 **Edw. III.**
1336.

Edward, &c., to the Sheriff of Devon, greeting.

Whereas the inheritance which belonged to Isabel De Fort, formerly Countess of Devon, and her ancestors, Earls of Devon, has by hereditary right descended to our beloved and trusted Sir Hugh De Courtenay, and the same Hugh holds that inheritance at the present time, we, wishing to regard our own and the Kingdom's honour, as well as that of Hugh himself in this behalf, have caused Hugh himself to be styled Earl of Devon, commanding him that taking to himself the title and style of Earl, he should name himself Earl of the place aforesaid, and therefore we direct you that as well in your County as in any other place in your baileywick where it seems to him expedient, you cause to be published that all persons for the future do call the aforesaid Hugh by the name of Earl of Devon as is fitting.

Creation of the Black Prince as Duke of Cornwall—Charter, R. C. V. 35.

No. 24.
11 **Edw. III.**
1338.

Edward, by the grace of God King of England, Lord of Ireland, and Duke of Aquitaine, to all, Archbishops, &c., greeting. Among other notable affairs of the realm we consider it to be most important that it should be fortified by a fitting distribution of orders, dignities and offices, supported by sound councils, and defended by the forces of powerful men. Therefore many hereditary degrees in our realm having come to the Royal hands, as well by the descent of inheritances according to the law of the same realm to co-heirs and parceners as by the failure of issue and other various events, the same realm has for a long time suffered a manifold decay in names, honours and dignity of degrees, we therefore, regarding with quiet meditation those things by which the same realm can be adorned, and that realm and the Holy Church of the same, and also other lands subject to our dominion can be most securely and becomingly defended against the attempts of enemies and adversaries, and our peace among our subjects elsewhere can be preserved unbroken, and desiring the notable places of the same realm to be distinguished with their former honours, and turning the regards of our consideration to the person of our beloved and trusty Edward, Earl of Chester, our first begotten son, and willing that his person should be honoured, have given to our said son the name and honour of Duke of Cornwall, with the common

assent and counsel of the prelates, earls, barons and others of our Council being in our present Parliament assembled at Westminster, on Monday next after the Feast of St. Matthias the Apostle last past, and have preferred him as Duke of Cornwall, and have girded him with a sword as is fitting. [Then follow grants "sub nomine et honore ducis dicti locis" of extensive landed property and the office of Sheriff of the County.] . . . To have and to hold to the same Duke and the first begotten sons of him and his heirs, being Kings of England and Dukes of Cornwall by succession of inheritance. . . . These being witnesses, &c., by the King himself and the whole Council in Parliament.

As to this charter, see *supra*, p. 47, and R. C. third Report, p. 186.

Creation of William de Clynton as Earl of Huntingdon—Charter, R. C. V. 29.

Edward, by the grace of God, &c., To Archbishops, Bishops, &c., amongst other notable affairs. [The preamble is in the same terms as that of the Black Prince's charter, *supra*, p. 254, down to and including the words "trusty and well-beloved." It then proceeds thus]: William de Clynton, willing that his person should be honoured as required by his deserts and very valiant deeds, have given to the same William the name and honour of Earl of Huntingdon, with the common assent, &c. [as at p. 254, *supra*], and have preferred him as Earl of Huntingdon, and have girded him with the sword, as is fitting, and in consideration of the premises we have given and granted for us and our heirs, and by this our charter have confirmed unto the aforesaid William 20*l.*, under the name and honour of Earl of Huntingdon, out of the farm or issues of the County of Huntingdon, every year at the Feast, &c., to have and hold to him and his heirs of us and our heirs for ever, wherefore we will and firmly command for us and our heirs that the aforesaid William and his heirs shall receive the said 20*l.* under the name and honour of Earl of Huntingdon, out of the farm or issues of the County of Huntingdon, every year at the Feast aforesaid, by equal portions, by the hands of the Sheriff of us and our heirs of the County aforesaid, who for the time being shall be, and they shall have and hold of us and our heirs for ever.

No. 25.

11 Edw. III.
1338.

These being witnesses [*names*]. Given under our hand at Westminster, the 16th day of March, by the King himself and all the Council in Parliament.

See *supra*, p. 76, and R. C. third Report, 179.

**Creation of Henry of Lancaster as Earl of Derby—
Charter, R. C. V. 31.**

No. 26.
11 Edw. III.
1338.

For Henry of Lancaster, Earl of Derby. Edward, &c., to Archbishops, &c., greeting. Know ye that whereas the eminence of numerous noblemen and the abundance of great and wise men are the principal ornament and the chiefest support of every Realm, we, at the request of the Prelates and Lords and of the Commonalty of our Realm meeting together in our present Parliament assembled at Westminster, willing therefore to honour and likewise strengthen the Royal sceptre by the multiplication of exalted persons, and considering the magnanimity, assiduity and prudent circumspection of our trusty and very dear Henry of Lancaster, who is related to us by a line of near consanguinity, and who according to his innate affluence of nobility has always shown himself dutiful and devoted to us, undergoing voluntary and votive labours for us not shunning the detriment of his person and property, and hoping that being promoted by us to greater honour he will have a still more ready spirit for future labours, by the declared counsel of our said Parliament have preferred him as Earl of Derby, and have invested him with the said Earldom by the girding of the sword, out of the abundance of special affection granting to him and his heirs the name and title of Earl of the said place of the Royal liberality. And to the end that to the exaltation of name there may follow an augmentation of means, since burdens are always annexed to honours. [Here follows grant of lands, &c.] Witnesses, &c.

See R. C. third Report, p. 177. The actual creation, say the Committee, was therefore by declaring the King's will in Parliament and by investiture of the dignity, at the same time girding Henry with the sword. The recital of the proceeding in the Letters Patent was a memorandum recording all the acts thus previously done by the King: the grant by the Letters Patent extended only to the annuity.

**Creation of William de Montagu as Earl of Salisbury—
Charter, R. C. V. 32.**

No. 27.
11 Edw. III.
1339.

Edward by the grace of God, King, &c. to Archbishops, &c., greeting. Know ye that whereas the glory of princes consists in the multitude of wise and exalted subjects, and the Royal throne is the more elevated and the government of the Realm strengthened the more noblemen of high estate and eminence there are under it, We, at the

request of the Prelates and Noblemen and Commonalty of our Realm assembled in our present Parliament coming together at Westminster, willing the more securely to establish the Royal sceptre as well by the addition of new honours as by the restoration of old, and to increase the number of noblemen by whose counsels our Realm can be directed in doubtful matters and be supported by their votes in adverse circumstances, have preferred our very dear eldest son Edward, whom we deservedly esteem above others in the prerogative of honour, as Duke of Cornwall, over which Dukes formerly long presided successively, and we have invested him with the said Dukedom by girding the sword on him as is the custom. Considering also, amongst others whom we have disposed to be promoted as Earls of divers places, the valiant probity and circumspect prudence and the double renown of character and race of our beloved and trusty William de Montagu, and also the labours, charges and perils to which with ready promptitude he has submitted himself for us and ours at all opportunities, and hoping that the addition of honour will add a grateful increase as well to his probity as his affection towards us, by the declared counsel of our said Parliament for the causes aforesaid and in grateful remembrance of the acceptable and useful services by him hitherto rendered to us, we have invested him with the Earldom of Salisbury by girding the sword on him, graciously and liberally granting to him and his heirs the name and title of Earl of the said place. [Here follows grant of annuity to him and his heirs.] Witnesses, &c.

(See R. C. third Report, p. 12.)

Termination of Abeyance of Earldom of Pembroke in favour of Laurence Hastings—Letters Patent, R. C. V. 40.

Edward, by the grace of God King, &c. Know ye that the presage of discretion and refinement which we have received from the apt auspices of the youth of our dear cousin Laurence de Hastings deservedly induces us to advance him in those things which respect the due preservation of his honour with condescending favours. Whereas also the inheritance of Adomar de Valence of happy memory, Earl Palatine (as it is called), long since deceased without heir of his body begotten, has devolved on his sisters to be divided proportionately between them and their heirs, inasmuch as it appears that the aforesaid Laurence, who succeeded the said Adomar in a part of the inheritance, is descended from the elder sister of the said Adomar,

No. 28.

13 Edw. III.
1340.

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and as on the declaration of skilled persons whom we have consulted hereupon the prerogative of the name and honour is due to him, we consider it just and due that the said Laurence, having his claim from the elder sister, do assume and hold the name of Pembroke which the said Adomar held during his life, which name, as far as in us lies, we do confirm, ratify, and also approve, willing and granting that the said Laurence do have and hold the prerogative and honour of a Palatine Earl in the lands which he holds of the inheritance of the said Adomar.

In witness, &c.

(See as to the above, *supra*, pp. 112, 115; and R. C. third Report, p. 180.)

Creation of John de Moubray as Earl of Nottingham— Charter, R. C. V. 61.

No. 29.

1 Rich. II.
1377.

Concerning the preferment of the Earl of Nottingham.

The King to the same, greeting. The reason of our providence in our tender age has to treat of future merits, and from the virtues of the parents to judge the promise of the progeny, for we trust that those things will certainly be good which derive their credit from a good origin, since that origin commonly cannot fail which has always been accustomed to increase virtuously; for it is said that the vital vein of springs partakes of this nature, that the savour which is imparted to the fountain, unless perchance it be vitiated by accident, cannot be denied to the streams. Wherefore, willing very amply to honour the person of our most renowned Cousin John de Moubray of Axiholm according to the nobility of his race and the merits of his conduct, in order that by his power and prudence the Royal sceptre may be supported, we have given to the same John the name and honour of Earl and have preferred him as Earl of Nottingham, and we do invest him with the same name and honour by the girding of the sword: To have and to hold the same name and honour of Earl of Nottingham to him and his heirs for ever. And to the end that the same Earl may be able the more honourably to bear himself according to the worthiness of the said name and the nobility of his estate, we have given and granted and by this our charter have confirmed for us and our heirs to the aforesaid Earl under the name of Earl of Nottingham twenty pounds to be received and had to him and his heirs aforesaid every year out of the issues of the same County by the hands of the Sheriff of that County who for the time shall be at the Feasts of Saint Michael and Easter by equal portions for ever.

Willing further of our special grace that all the Castles, lordships, manors, lands and tenements which the ancestors of the aforesaid John by hereditary right or acquisition heretofore held and possessed, and which the same John hereafter is to have, shall henceforth be held under Comitival honour [*sub honore comitali*] and as parcels of the said Earldom, the right of others in all things being always saved. Wherefore we will and firmly command for us and our heirs that the aforesaid John shall have and hold the name and honour of Earl of Nottingham, and shall receive and have the said twenty pounds yearly under the name of Earl of Nottingham out of the issues of the County aforesaid to him and his heirs for ever; and that all castles, lordships, manors, lands and tenements which the ancestors of the aforesaid John by hereditary right or acquisition heretofore held and possessed, and which the same John hereafter is to have, shall henceforth be held under Comitival honour and as parcel of the said Earldom, the right of others in all things being always saved as it is aforesaid. These being witnesses (&c.). . . .

(Given by our hand at Westminster on the day of our Coronation in the first year of our reign.)

By the King himself.

(See *supra*, p. 63, and R. C. third Report, p. 188.)

Creation of the King's Uncle Thomas as Earl of Buckingham—Charter, R. C. V. 62.

Richard, by the grace of God King, &c. to all to whom, &c., greeting. Know ye that whereas the glory of princes consists in the multitude of wise and exalted subjects, and the Royal throne is the more elevated and the government of the realm strengthened the more noblemen of high estate and eminence there are under it. And we considering the assiduity, increasing prudence, and laudable conduct which we perceive to flourish in our very dear uncle Thomas of Wodestok, who is related to us in so near a line of consanguinity, and therefore very fully to honour his person according to the renown of his race and the merits of his manners, so that by his power and prudence the Royal sceptre may be supported, for the exaltation and worthiness of his estate, we have given to the same Thomas the name and honour of Earl, and have preferred him as Earl of Buckingham, and we have invested him with the same name and honour by the girding of the sword, out of the abundance of special affection; to have and to hold the same name and honour of Earl of Buckingham

No. 30.

1 Rich. II.
1377.

to him and his heirs for ever. And to the end that to the exaltation of name there may follow an augmentation of means, since burdens are always annexed to honours, we have given and granted and by this our charter have confirmed to the aforesaid Earl, under the name of Earl of Buckingham, twenty pounds, to be received and had to him and his heirs aforesaid every year out of the issues of the same County (&c.) . . .

(See *supra*, pp. 77 and 113.)

Creation of the King's Uncle, Earl of Cambridge, as Duke of York—Charter, R. C. V. 64.

No. 31.
9 Rich. II.
1336.

Richard, by the grace of God King, &c. to Archbishops, Bishops, &c., greeting. It is evident that the commonwealth is fortunate which is resplendent and adorned with many noblemen eminent not only for ripeness of counsel but for valour of arms; for like as Heaven is rendered splendid and brilliant by the stars, so not only realms but Royal crowns glitter with the light of dignities, and the more noble and valiant he shall be who is elevated to dignities of honour, the more worthy he is naturally made when with the increase of gifts the reasons for gifts increase, and from him to whom more is committed a more perfect order of conversation and governance is required; for who will presume negligently or culpably to treat his opinion whom he shall feel to have been elevated to the highest honours on account of the excellence of his merits? Revolving therefore these things in the balance of Royal examination, we have directed the regard of our consideration to the person of our magnificent and very dear uncle Edmund Earl of Cambridge, whom, on account of the great excellence of his merits, and especially valiantness in arms and profundity of counsel, we chose from the beginning of our rule to advance to the highest honours, knowing that in justice we are bound to make a just recompense of merits with titles significant of such great virtues, and whatsoever is bestowed on a person of unknown merits passes wholly by favour as a gratuitous and voluntary gift. And therefore when we lately entered the Realm of Scotland and unfurled our victorious banners against the enemies, we erected our aforesaid uncle as Duke, his excellent merits and services rendered deservedly requiring it, assigning to him the title and name of the Dukedom of York. And because with increasing highness of estate, as a certain consequence, divers necessary expenses and charges increase, we promised to him to give and assign to him, for the more honourable support of his Ducal

estate, lands, possessions and rents to the value of one thousand pounds sterling yearly, which we will effectually and really cause to be delivered and assigned to him. Willing meanwhile, until the said lands, possessions and rents shall have been really assigned to him by us as it is aforesaid, that he and his heirs male of his body issuing shall yearly receive the aforesaid one thousand pounds from our Exchequer at the feasts of Michaelmas and Easter, there being always deducted proportionally the sum which we or our heirs shall cause to be assigned to him or his heirs aforesaid from time to time in lands, possessions and rents. Which same title and name with the sum aforesaid we give, grant and assign to him and his heirs male of his body issuing as it is aforesaid by the tenour of these presents, to be possessed as a mark of perpetual honour. These being witnesses (&c.). . . .

**Creation of the King's Uncle as Duke of York—
Extract from Parliament Rolls, R. C. V. 69.**

Be it remembered that whereas the Lord the King lately, revolving in the balance of Royal examination how like as Heaven is rendered bright and splendid by the stars, so not only realms but royal crowns glitter with the light of dignities, and therefore when he recently entered the Realm of Scotland and unfurled his banners there against the enemies, he erected his very dear uncle Edmund, Earl of Cambridge, renowned for his valour and ripeness of counsel, as Duke, as required by his merits and the services before rendered by him, and gave, granted, and assigned to him and his heirs male of his body issuing the title and name of the Dukedom of York, and promised for the more honourable support of such his estate to give and assign to him and his heirs aforesaid lands, possessions, and rents to the value of one thousand pounds yearly, and to cause the same effectually to be delivered and really assigned. Willing meanwhile, until the said lands, possessions, and rents should be really assigned to him by him the said King as it is aforesaid, that he and his heirs aforesaid should yearly receive the aforesaid One thousand pounds from the Exchequer of the same Lord the King at the Feasts of Michaelmas and Easter, there being always deducted proportionally the sum which the same Lord the King should cause to be assigned to the aforesaid Duke or his heirs aforesaid, from time to time in such lands, possessions, and rents as in the charter of the same Lord the King thereof, made and exhibited in the present Parliament, it is more fully contained. Which same charter follows in these words:—[See

No. 32.

9 Rich. II.
1386.

supra, p. 260] . . . Sitting therefore the said Lord the King in the full present Parliament, wearing the Royal insignia, and solemnly crowned with the Royal Crown, and likewise appearing and the aforesaid Duke standing before him honourably arrayed and adorned, as such ceremony requires, and as becomes a person exalted to the height of such great dignity, the eminent, eloquent, and discreet doctor, Master Walter Skirlawe, Keeper of the Privy Seal, elect and confirmed of Coventry and Lichfield, by royal command very gravely expounded the premises in full Parliament, with the many motives and causes inducing such creation. And moreover the same Lord and King willing, as becomes the highness of the Royal serenity, more abundantly to honour the person of the said Duke, which is manifestly made illustrious by the renown of his lineage, and in many ways embellished with marks of virtue, and most gladly to amplify the means of his substance and patrimony to him and his heirs aforesaid, and the more firmly to establish such his estate and other the premises by royal authority, holding valid and acceptable the charter aforesaid and all things therein contained, ratified, approved, and confirmed them for him and his heirs to the aforesaid Duke and his heirs aforesaid in the form aforesaid, in full Parliament, in the presence of the Prelates, Peers, and great men and all the Commonalty, and willed them to obtain and have the force of perpetual validity, and maturely invested the same Duke with the aforesaid title, name, and honour by the girding of the sword, and by putting on his head the cap and golden circlet, and with his own hands handed and really delivered to the same Duke the charter aforesaid, in full testimony and perpetual remembrance and assurance of the premises; and his homage having immediately been taken for the Dukedom aforesaid with a joyful countenance he commanded him to sit among the Peers of Parliament in the highest degree; which the same Duke willingly did without delay.

**Creation of Michael De la Pole as Earl of Suffolk—
Charter, R. C. V. 69.**

No. 33.
9 Rich. II.
1386.

Richard, by the grace of God King of England, &c. to archbishops, bishops, &c., greeting. We hope not only to embellish but to increase the height of the Royal dignity with happy omens when we dispense titles of honour among noble, discreet, and valiant persons, for we believe our Royal Crown to shine with so many more gems and to sparkle with precious stones the more it is strengthened with virtuous and valiant men, especially excelling in counsel, called as part of the Royal solicitude to the burdens of honours for the direction of the

public good. And for that reason William, late Earl of Suffolk, having been withdrawn from this light without heirs male as it has pleased the Most High, and the greatest part of his patrimony having moreover lawfully devolved to us, we choose rather by continuing the name and dignity of so great an Earl to add to the honour of our diadem than by suppressing his name to apply the profits of his patrimony to our fiscal uses. Wherefore we have directed the regard of our consideration to the valiant and discreet man, Michael de la Pole, Chancellor of our Realm, who before these times since we undertook the government of the Realm has rendered to us many, not only useful, but fruitful and honourable services, and we have erected him on account of his eminent merits to the honour of God, the adornment of our Royal Crown, and the strengthening and fortifying of our Realm aforesaid as Earl of Suffolk, and we do prefer and create him as Earl of the County aforesaid, with the honour and name due to the same by the tenour of these presents, and have girded him with a sword as is fitting. Willing for us and our heirs that he and his heirs male of his body issuing for the estate, style, or title of the Earldom aforesaid shall receive, have, and hold twenty pounds sterling every year by the hands of the Sheriff of us and our heirs of the County aforesaid, who for the time shall be, out of the issues or farm of the same County in all future successive times for ever at the feasts of St. Michael and Easter by equal portions. Wherefore we will and firmly command for us and our heirs that the aforesaid Michael and his heirs aforesaid shall receive, have, and hold the aforesaid twenty pounds for the estate, style, or title of the same Earldom out of the farm or issues of the county, &c. These being witnesses [various], given under our hand at, &c., 6th day of August, in the ninth year of our reign. (*Per ipsum regius.*)

(See *supra*, p. 72, and R. C. third Report, p. 191.)

Creation of Sir John Beauchamp as Baron Beauchamp of Kyderminster—Letters Patent, R. C. V. 81.

Richard, by the grace of God King, &c. to all to whom &c., greeting. Know ye that for the good and gratuitous services which our beloved and trusty Knight, John de Beauchamp, of Holt, Steward of our Household, has rendered to us and the duties rendered to us by him at the time of our Coronation until now, and which he shall be able to hold for us in future in our Councils and Parliaments, and also for the noble and trusty race from which he descends, and for his magnificent

No. 84.

11 Rich. II.
1387.

intelligence and circumspection, we have preferred the same John as one of the Peers and Barons of our Realm of England. Willing that the same John and the heirs male of his body issuing shall obtain the estate of Baron, and shall be called Lords of Beauchamp and Barons of Kydermynster. In witness whereof, &c. Witness the King at Wodestok, the 10th day of October.

By Writ of Privy Seal.

This was the first creation of a Peerage by Letters Patent, see *supra*, p. 29; R. C. third Report, p. 197; fourth Report, p. 274.

Restoration of Aubrey de Vere to Earldom of Oxford
—Extract from Rolls of Parliament, 16 Rich. II.,
R. C. V. 109.

No. 35.
 16 Rich. II.
 1392.

Be it remembered that in this Parliament, for that Robert de Veer, late Duke of Ireland and Earl of Oxford, has been committed to God, and our Lord the King is certainly informed that certain lands and tenements which belonged to the said Robert before the judgment rendered against him in the Parliament holden at Westminster, on Monday after the Purification of Our Lady in the eleventh year of the reign of our said Lord the King, and which by force of the said judgment were forfeited to our said Lord the King and seized into his hand, were entailed by fine, and by force of the said entail ought to descend to Sir Aubrey de Veer, as uncle and heir to the said Robert; therefore our Lord the King has granted, with the assent of Parliament, to the said Sir Aubrey, livery of all the lands and tenements so entailed to him by Fine as is abovesaid. And further, although the said Sir Aubrey has not yet shown anything special (to prove) that the name and estate of the Earl of Oxford are entitled to him, nevertheless our said Lord the King, having consideration of the good and agreeable service which the said Sir Aubrey has done as well to our said Lord the King as to his noble Lord and father, whom God absolve, and how that the ancestors of the said Sir Aubrey have been Earls of Oxford from ancient times, and willing that the name and estate of the Earl of Oxford, even though they were forfeited by virtue of the said judgment, should not cease altogether for the cause abovesaid, but may be continued in time to come to the honour of our said Lord the King and of his Realm, therefore he has of his special grace restored, given, and granted, with the assent of Parliament, to the said Sir Aubrey the name, title, estate, and honour of the Earl of Oxford, to have the said name, title, estate, and honour to the said Sir Aubrey

and his heirs male for ever, and made him Earl of Oxford in full Parliament. And now the said Earl did homage to our said Lord the King, and was then placed and seated in his place with his peers in Parliament, very humbly thanking our said Lord the King for his good and gracious lordship abovesaid.

**Restoration of Aubrey de Vere to Earldom of Oxford
—The Charter, 16 Rich. II., R. C. V.**

Richard, by the grace of God King, &c., to his Archbishops, Bishops, &c., greeting. Among other honourable tokens of our Realm we deem this to be the principal, that our said Realm should be entrenched with a suitable distribution of dignities, imbued with sound counsels, and supported by the powers of hardy and noble men. Now, indeed, in the present Parliament, understanding for certain that Robert de Veer, late Duke of Ireland and Earl of Oxford, has entered the way of all flesh, and by that pretext, and also for that we are clearly informed that certain lands and tenements, which were of the aforesaid Robert before the judgment rendered against him in our Parliament, holden at Westminster on the morrow of the Purification of the Blessed Mary, in the eleventh year of our reign, and which, by virtue of the judgment aforesaid, are forfeited to us and seized into our hand, are entailed by divers Fines exhibited and shown before our Council, and by virtue of the entail aforesaid and of the Fines aforesaid ought to descend to our beloved and trusty Cousin, Aubrey de Veer, as uncle and heir of the aforesaid Robert, willing to act graciously with the same Aubrey, with the assent of our instant Parliament, we have granted to the same Aubrey livery of all the lands and tenements entailed to him by such Fines: to have and to hold according to the tenour and effect of the Fines aforesaid. And further, although the same Aubrey has as yet shown or exhibited nothing special [to prove] that the name and estate of Earl of Oxford are entailed to him: We nevertheless, considering the good and laudable service rendered by the same Aubrey as well to us as to our very dear Lord and father deceased, and also the merits of virtues and probity with which the same Aubrey is in many ways distinguished, and also how that the ancestors of the aforesaid Aubrey have been Earls of Oxford from ancient times, and not willing therefore that the estate and name of Earl of Oxford, although they may have been forfeited by force of the judgment aforesaid, should cease or be destroyed, but rather continued in future to the honour of God and the adornment of our Crown, and to the advantage and defence of our

No. 36.

16 Rich. II.
1392.

Realm, of our special grace and with the assent aforesaid, have restored, given and granted and by these presents do give and grant to the aforesaid Aubrey the name, title, estate and honour of Earl of Oxford: to have and to hold the name, title, estate and honour aforesaid to the same Aubrey and his heirs male for ever. Wherefore we will and firmly command for us and our heirs that the aforesaid Aubrey shall have and hold the name, title, estate and honour aforesaid to him and his heirs male for ever as it is aforesaid. These being witnesses (&c.). . . . Given by our hand at Winchester the twelfth day of February.

(See *supra*, p. 48, and R. C. fourth Report, p. 274.)

Creation of John de Beaufort as Earl of Somerset— Charter, R. C. V. 114.

No. 37.
20 Rich. II.
1396.

Richard, by the grace of God King, &c., to his archbishops, &c., greeting. Know ye that we, considering the assiduous probity and circumspect prudence and the double renown of manners and of race of our beloved and trusty Cousin John de Beaufort, Knight, son of our very dear Uncle John, Duke of Aquitaine and Lancaster, and willing therefore worthily to exalt the same John de Beaufort to the prerogative of honour, do prefer and create the same John de Beaufort as Earl of Somerset in our present Parliament and do invest him with the style, title and name and honour of Earl aforesaid by the girding of the sword; to have to him and the heirs male of his body issuing for ever. And that the same Earl and his heirs aforesaid according to the worthiness of such great name and honour may be able the better and more honourably to support the burdens incumbent on him, of our special grace in our present Parliament we have given and granted, and by this our Charter have confirmed to the same Earl and his heirs aforesaid Twenty pounds, to be received every year out of the issues of the County aforesaid by the hands of the Sheriff of that County who for the time shall be, at the Terms of Easter and Saint Michael by equal portions for ever. These being witnesses: [&c.] . . .

Given by our hand at Westminster, the 10th day of February.

(See *supra*, p. 77, and R. C. third Report, p. 192.)

The Rolls of Parliament of the 20 Rich. II. state the creation of the above John de Beaufort (the legitimated son of John of Gaunt, Duke of Lancaster) with considerable particularity. The entry first states that the Chancellor, by the King's command,

declared that the King had, of his royal dignity and special grace, "*fait et cree Jean de Beaufort en Comte*," and had given him the name and honour of Earl of Somerset, to have to him and the heirs males of his body lawfully begotten, with 20*l.* a year, to receive from the issues and profits of the county of Somerset for his title and name of earl. Whereupon John was brought before the King in Parliament between two Earls, to wit, Huntingdon and Mareschall, clad in a robe as a vesture of honour, and his sword borne before him, the pomil "*adrezsez*"; and thereupon the King's charter of his creation was openly read before the King, Lords, and Commons in Parliament; and then the King himself girded the earl with his before-mentioned sword, and received his homage, and caused him to be seated in his place of Parliament; to wit, between the Earls Mareschall and Warwyk. The charter is then set forth on the Roll verbatim. The Redesdale Committee say (third Report, p. 192): "The patent and the ceremony in Parliament must here be taken as one act, the patent describing what appears by the Roll to have been done after the patent had been read in Parliament, and therefore must be taken (so far as it relates to the creation of the dignity) rather as a declaration of what the King did in Parliament than as an original declaration of the King's pleasure, perfect for the purpose of creation, according to the form of later patents. But the patent also operated as a grant under the Great Seal of the annuity of 20*l.* a year given to the earl out of the issues of the county of Somerset; and this annuity is stated in the patent as given to enable the earl to support the dignity conferred upon him, and not as essential to his creation as Earl of Somerset.

"Upon this transaction it may be observed that John de Beaufort had not been summoned to Parliament by writ previous to his introduction stated in the Roll, nor was any writ issued to him for the purpose of his introduction. He was probably brought into the Parliament by a verbal message from the King, and the King's pleasure was then declared by the Chancellor in the King's name, and by production of the patent under the Great Seal, unless the seal was at the time affixed to the instrument in the King's presence in Parliament. John de Beaufort does not appear to have been before a baron; he probably had no territorial barony, and as he was not ever summoned to Parliament as a baron, he was not after his creation and taking his seat in Parliament, a baron of the realm though a peer of the realm, except as an earl might be deemed a baron."

**Creation of William le Scrope as Earl of Wiltes—
Charter, R. C. V. 117.**

No. 38. Richard, by the graee of God King, &c., to his Archbishops, Bishops, &c., greeting.
 21 Rich. II.
 1397.

Know ye that we, considering the probity, strenuous and provident circumspection of the twofold illustriousness of manners and of birth of our beloved and trusty William le Scrop, chevalier, and willing therefore him the said William deservedly to exalt by the prerogative of honour, do advance and create him the said William in this our present Parliament to be Earl of Wiltes, and do invest him with the style, title and name and honour of the place aforesaid by the girding of the sword, to have to him and his heirs male for ever ("et heredibus suis masculis in perpetuum"). And in order that the same Earl and his heirs aforesaid for the decency of so great a name and honour may be the better and more honourably able to support the burdens incumbent on the same, of our special grace we have in our present Parliament given and granted and by this our present charter do confirm to the same Earl and his heirs aforesaid twenty pounds to be received every year out of the issues of the County of Wiltes by the hands of the Sheriff of that County for the time being at the terms of Easter and Michaelmas by equal portions for ever. These being witnesses, &c.

Given under our hand at Westminster on the 29th day of September.
 By the King himself in Parliament.

(See *supra*, p. 89, and R. C. third Report, p. 42.)

**Creation of Hen. IV.'s son as Prince of Wales, Duke
of Cornwall, and Earl of Chester—Extract from
Rolls of Parliament, R. C. V. 130.**

No. 39. Also on the same Wednesday in full Parliament it was shown by the said Archbishop of Canterbury how that God of His very great grace, considering the very great desolation and apparent destruction of this honourable Realm of England, has sent the King our Lord, who is here, for the recovery and consolation of the same Realm, and how that since his arrival therein God has provided for all parts graciously by our same Lord the King, and also how that all the Estates of the Realm entirely and kindly and with one accord and assent have accepted him as their rightful King, and also how that God of His grace has granted him very honourable and very fine
 1 Hen. IV.
 1399.

offspring; and therefore our same Lord the King, willing and desiring, like his noble grandfather the King Edward the Third and his other noble progenitors before him have willed and desired, the honour and the increase of his eldest son Henry of Lancaster, is purposed to create and make him in the estate, honour and dignity of the Prince of Wales, Duke of Cornwall, and Earl of Chester, and willing hereupon to have full advice, deliberation and assent of all the Lords Spiritual and Temporal and of all the Commons being in this present Parliament, if they will consent hereto; and besides this, in case it happen that our same Lord the King pass from this world at the will of God, whether they would accept the said Prince, in case he survive our said Lord the King his father, as right heir to the Realm and the Crown of England; which demand being severally made and examined by all the Lords and Commons abovesaid, it is answered and assented to by those Lords and Commons that the said eldest son Henry be made Prince of Wales, Duke of Cornwall, and Earl of Chester; and also that in case our Lord the King who now is should decease in the lifetime of the said Prince his eldest son, they will accept the said Prince as right heir to the Realm and Crown abovesaid, and obey him as their King and liege Lord. Whereupon our same Lord the King, sitting in his Royal Seat in full Parliament, put a crown on the head of the said Henry his eldest son, and gave ^{Cerle.} him a ring of gold on his finger, and delivered to him in his hand a staff of gold, and then kissed him, and gave him his charter thereof, and so made him Prince of Wales, Duke of Cornwall, and Earl of Chester, and hereupon caused him to be led thus arrayed by the Duke of York, uncle to our said Lord the King, to the seat ordained and assigned to him in Parliament because of the Principality abovesaid.

(See R. C. third Report, p. 194.)

**Creation by Hen. IV. of his Son as Prince of Wales,
Duke of Cornwall, and Earl of Chester—Charter,
R. C. V. 129.**

Henry, by the grace of God, &c., say to all, &c., greeting. Know No. 40.
ye that of our special grace and of our certain knowledge and with 1 Hen. IV.
the counsel and assent of the Prelates, Dukes, Earls, Barons, and 1399.
Commonalties of our Realm of England in our instant Parliament
being assembled at Westminster, we have made and created Henry,
our very dear eldest son, Prince of Wales, Duke of Cornwall, and Earl
of Chester, and have given and granted, and by our charter confirmed,

to him the said Principality, Dukedom, and Earldom, and invested him with the same Principality, Dukedom, and Earldom so that being preferred he may preside there, and presiding may rule and defend the said parts by a coronet on his head and a gold ring on his finger and a gold staff according to the custom; to have and to hold of us to him and his heirs Kings of England for ever. Wherefore we will and firmly command for us and our heirs that the aforesaid Henry, our son, shall have and hold of us the Principality, Dukedom, and Earldom aforesaid, to him and his heirs Kings of England for ever as it is aforesaid. These being witnesses: [&c.] . . .

Given by our hand at Westminster, the 15th day of October.

By the King himself.

(R. C. third Report, p. 195.)

Creation of John of Lancaster, the King's Brother, to be Earl of Kendal and Duke of Bedford—Extract from Patent Rolls, R. C. V. 171.

No. 41.
2 Hen. V.
1414.

Henry, by the grace of God King of England, &c., to all to whom, &c., greeting. Know ye that whereas the Royal throne and the highness of the Royal dignity consists in the multitude of wise and exalted persons, and the government of the Realm is the more established the more noblemen there are under it of lofty estate and eminence. We therefore, in our present Parliament assembled at Leicester, directing the regard of our consideration to the premises, and willing therefore more securely to establish the Royal sceptre as well by the addition of new honours as by the restoration of old ones, and to augment the number of noblemen, especially those issuing from the Royal stock, by whose counsel our Realm may the more abundantly and sagaciously be directed in doubtful matters, and be supported by their votes in adverse circumstances, have preferred our very dear brother John of Lancaster (whom as well nobility of race, as of manners, knowledge, and valour, and of elegance and of assiduity, with other merits, as tokens and flowers of virtues have proved to be commendable) as Earl of Kendale, and next as Duke of Bedford, in our same Parliament, with the assent of the prelates and nobles and of the Commonalty of our Realm therein being, and we have personally invested him with the said Earldom and Dukedom by the girding of the swords and the imposition of the cap and the rod of gold, as the custom is: To have and to hold to our aforesaid brother the styles, honours, and names aforesaid for his natural life only. And to the end that our same brother, according to the worthiness of his names

For life only.

and honours, as is aforesaid, may the better and more honourably be able to support the burdens incumbent on him, we have given and granted to our same brother, that is to say, for the said estate of Earl twenty pounds, and for the aforesaid estate of Duke forty pounds, to be received every year for the term of his life out of the issues, profits, farms, emoluments, and commodities of the County of Bedford at the feasts of Saint Michael and Easter by equal portions, by the hands of the Sheriff of that County for the time being. In witness whereof, &c. . . .

(See R. C. third Report, p. 197.)

Creations of the King's Brother John as Earl of Kendal and Duke of Bedford, and of his Brother Humphrey as Duke of Gloucester—Extract from Rolls of Parliament, R. C. V. 172.

Be it known that our very Sovereign Lord the King, sitting in Parliament on his Royal seat, at the request of his Lords Spiritual and Temporal and of his Commons assembled in the same Parliament, created and preferred John of Lancaster, his brother, as Earl of Kendale and Duke of Bedford, and Humfrey of Lancaster, his other brother, as Earl of Pembroke and Duke of Gloucester. And then the King, of his special and gracious will, created and preferred Richard of Warwick as Earl of Cambridge. And hereupon, after the homages done to the King by each one of the same Dukes and Earl, the said Dukes and Earl were commanded by the King to sit in their seats in Parliament assigned to them by the King.

No. 42.
2 Hen. V.
1414.

Creations of Duke of Clarence and Earl of Dorset—Extract from Rolls of Parliament, R. C. V. 173.

On Tuesday, the last day of this Parliament, the King our very Sovereign Lord, considering how that his eldest brother Thomas, before he betook himself to the parts of France in the service of their very honourable Lord and father Henry late King of England, was made and created by their said Lord and father Duke of Clarence, to have and enjoy the style and honour of the Duke of Clarence under a certain form specified in the letters patent made to him by his said Lord in that behalf; and also how that Thomas Beauford, uncle to our said very Sovereign Lord, in going by command of the said late

No. 43.
2 Hen. V.
1414.

King in the same service in the company of the said Duke to the parts aforesaid, was likewise made and created Earl of Dorset at the same time by the said late King, to have and enjoy the style, name, and honour of the Earl of Dorset under a certain form also contained in the letters patent made to him thereof by the said late King; and forasmuch as this Parliament is the first which has been summoned here in England since the returns of the said Duke and Earl from the parts over there abovesaid into England, to which Parliament they are now come, the said King our very Sovereign Lord, for the greater surety of the same Duke and Earl in this behalf, of his very benign grace and very gracious will, with the assent of the Lords Spiritual and Temporal and of the Commons in this present Parliament assembled, in this same open Parliament, declared the said Thomas, his very honourable brother, Duke of Clarence, to have and enjoy the style, name and honour of Duke of Clarence according to the effect and form of the said letters patent made to him thereof; and also our said very Sovereign Lord declared in the same open Parliament, with the assent aforesaid, the said Thomas, his honourable uncle, Earl of Dorset, to have and enjoy the style, name and honour of Earl of Dorset according to the effect and form of the aforesaid letters patent made to him thereof, as above.

(See R. C. third Report, p. 197.)

Creation of Henry de Percy as Earl of Northumberland.

No. 44.

3 Hen. V.
1416.

The King to the same [Archbishops, Bishops, Abbots, Priors, Dukes, Earls, Barons, Justices, Sheriffs, Reeves, ministers and all his bailiffs and trusty people], greeting. It is evident that the prince is glorious, and the commonwealth under him consequently happy, who is encompassed with the aid of many noblemen, and especially of those who are powerful in action. For as Heaven is made bright and shining with stars, so Kings and realms are refulgent with the light of dignities; not that man is changed by honours, but because he is made more virtuous who through his own famous merits is raised up to honours and elevated to the highest dignities; for what man will find fault with the opinion of one whom he knows to be chosen to the summit of dignity by reason of the excellence of his merits? Revolving these things therefore in the study of the Royal highness, and considering that the reward of merits proceeds from a justly ruling government; and having regard to the assiduity, prudence and laud-

Armario.

able conduct which we perceive to flourish in our illustrious and renowned Cousin Henry de Percy, and therefore willing very amply to honour his person according to the renown of his race and the merits of his manners, so that by his power and prudence the Royal sceptre may be supported, we have given to the same Henry the name and honour of Earl, and we do prefer him as Earl of Northumberland, and by the girding of the sword we do invest him with the same name and honour: To have and to hold the same name and honour of Earl of Northumberland to him and his heirs for ever. And to the end that the same Earl according to the worthiness and nobility of the said name may be able the more honourably to behave himself, we have given and granted and by this our charter have confirmed for us and our heirs to the aforesaid Earl under the name of Earl of Northumberland twenty pounds, to be received and had to him and his heirs aforesaid every year out of the issues of the same County by the hands of the Sheriff of that County who for the time shall be at the feasts of Saint Michael and Easter by equal portions for ever. Wherefore we will and firmly command for us and our heirs that the aforesaid Henry shall have and hold the name and honour of Earl of Northumberland, and shall have and receive the said twenty pounds yearly under the name of Earl of Northumberland out of the issues and profits of the County aforesaid to him and his heirs for ever as it is aforesaid. These being witnesses (&c.) . . . Given by our hand at Westminster, the 16th day of March.

By the King himself.

(See R. C. third Report, p. 197.)

Creation of John Cornwall as Baron de Faunhope— R. C. V. 213.

[Memorandum enrolled in the Roll of the Parliament last holden at Westminster in 11 Hen. VI. (See Rot. Parl. IV., p. 400.)] **No. 45.**

Be it remembered that whereas among the other glorious cares of the commonwealth and the various solitudes incumbent on the Royal shoulders, the worthy reward of merits is esteemed to be the principal and especially to consolidate the Royal throne from which it flows, for there virtue increases and is practised where it is not disappointed of the reward due to it. And whereas honour is the reward of virtue, it is evident that the tokens of honours and the rewards of dignities are

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due to the virtuous and assiduous from the Royal justice. Hence our most Christian Prince and Lord the King, duly weighing in the balance of discussion the magnificent and fruitful and highly laudable labours, honours and services which have in many ways been poured out and rendered, not only to himself, but also to the Lord Henry of most happy memory, late King of England, his father deceased, and also to others his progenitors and to all the Realm of England by his beloved and trusty liege man of his Realm of England, John Cornewayll, Knight (who was lately united in matrimony to the very dear grandmother of the same Lord the King, Elizabeth, late Countess of Huntingdon), as well in England as in the Conquest of the Realm of France and of the Duchy of Normandy, and willing therefore to reward the same John with some, though not worthy, prerogative of honour, as his noble actions have in no small degree induced and daily induce the same Lord the King (to do), on the seventeenth day of July, the last day of the present Parliament (in the presence of the three Estates of the same Parliament), of his special grace and of his certain knowledge, and with the advice and assent of the illustrious Prince the Lord Duke of Gloucester, and of the most Reverend Father in Christ the Lord Henry, Bishop of Winchester and Cardinal of England, and of other Lords Spiritual and Temporal being in the Parliament aforesaid, has erected, preferred and created the aforesaid John as a Baron indigenous of his Realm of England, and has imposed, given, granted and assigned to the same John the name, style, title and honour of Baron of Faunhope; willing and granting to the same that he shall have and bear the name of Baron of Faunhope, and shall be called and named the Baron of Faunhope, and shall in all things be held, treated and reputed as a Baron indigenous and his true liege of the same Realm, and also he shall have, hold, and possess his seat and place in Parliaments and Royal Councils among the other Barons of the said Realm of England; and also he shall enjoy and use all and singular rights, liberties, privileges and immunities wheresoever within the same Realm of England as fully and entirely and in the same manner and form as other Barons of the same Realm before these times have best and most quietly used and enjoyed and at present most fully enjoy and use. In witness whereof, &c. . . .

(See *supra*, p. 66.)

**Creation of John, Lord Beaumont, to be Viscount
Beaumont—Letters Patent, R. C. V. 235.**

Henricus, by the grace of God King, &c., to Archbishops, Bishops, &c., greeting. Know ye that whereas we perceive it to be becoming to our Royal Majesty that we should exalt with singular honours those who show themselves constant in our household service, especially in those things which proceed from our mere prerogative and liberal grace, and particularly those whom the memory of departed ancestors has ennobled, and the merits of whose own virtues adorn with manifest evidence to the end that rewarded virtue may be inwardly confirmed, and may allure many to virtuous deeds: hence it is that we, considering the nobility of the race of our very dear Cousin John, Lord of Beaumont, and the services which his ancestors faithfully rendered to our progenitors, and those most agreeable services which he himself has laudably rendered to us from our earliest years daily until now, and desires to continue the same in future, and to make them the more advantageous to us the more he may shine with a higher prerogative of honour, of our special grace in our present Parliament, do impose on the aforesaid John, Lord of Beaumont, our Cousin, and the heirs male of his body issuing, the name of Viscount of Beaumont, and really do invest him with the insignia* of Viscount of Beaumont; and we have assigned to him a place in our Parliaments, Councils and other assemblies above all Barons of our Realm: to whom, in order that the estate of Viscount aforesaid may be the more becoming and adorned in himself, of our mere motion and liberality, we have given and granted for us and our heirs, as much as in us is, to the aforesaid John and his heirs, together with the name, insignia and place aforesaid, twenty marks, to be received yearly to him and his heirs male of his body issuing out of the farms, issues (&c.). . . . To have and to hold to him and his heirs aforesaid the name, insignia, place and twenty marks aforesaid for ever. Although express mention (&c.). . . . In witness whereof, &c. . . .

No. 46.

18 Hen. VI.
1439—40.* Coronet,
robes, &c.

This is the first creation of a viscount in England. See *supra*, p. 3; and R. C. third Report, p. 197.

**Creation of Ralph Botiller as Baron Sudeley—Letters
Patent, R. C. V. 239.**

No. 47. The King to all to whom, &c., greeting. Know ye that we, inwardly
 20 Hen. VI. pondering the profundity of character, ripeness of counsel, valour in
 1441. arms, and probity of manners, and also the knowledge, fidelity and
 industry with which our beloved and trusty Knight, Ralph Botiller,
 our Chamberlain, flourishes, excels and abounds, and willing in some
 way to reward the same Ralph according to the requirement of his
 merits, by the advice of our Council, have preferred, ordained, con-
 stituted and created the same Ralph as Baron of Sudeley, in the
 County of Gloucester, and we have given and granted to the same
 Ralph the name, style, title and honour of Baron of Sudeley, and we
 have invested, distinguished and ennobled him with the pre-
 eminences and dignities and other things whatsoever appertaining or
 belonging to the estate of a Baron of our Realm of England as well in
 session in our Parliaments and Councils as otherwise howsoever it
 shall be, and we will him to be called a nobleman of our Realm afore-
 said: to have and to hold the name, style, title and honour of Baron
 of Sudeley, together with the pre-eminences, dignities, and other
 things aforesaid to the same Ralph and the heirs male of his body
 lawfully begotten for ever. And to the end that the same Ralph and
 his heirs aforesaid may be able to maintain and support the estate
 aforesaid and the burdens incumbent on them, we have given and
 granted for us and our heirs to the said Ralph and the heirs male of
 his body, lawfully begotten, for ever, two hundred marks, to be had
 and received yearly, to the aforesaid Ralph and his heirs aforesaid,
 out of the farms, issues, profits and revenues of the County of Lincoln,
 arising by the hands (&c.). . . . Although express mention (&c.).
 . . . In witness whereof, &c. Witness the King at Westminster,
 the 10th day of September. . . .

(See *supra*, p. 29.)

**Richard Nevil, Husband of Alesia, sole Daughter and
Heiress of Thomas Earl of Salisbury, recognized
as Earl of Salisbury, R. C. V. 236.**

No. 48. The King to all to whom, &c., greeting. Know ye that whereas
 20 Hen. VI. the Lord Edward, late King of England, the Third after the Conquest,
 1442. our progenitor, with the declared counsel of his Parliament, holden in
 the eleventh year of his reign, by his letters patent, dated at West-
 minster on the tenth day of March in the same year, by reason of

various no slight causes then specially moving him, graciously invested William de Montagu of the Earldom of Salisbury by girding him with the sword, freely granting to him and his heirs the name and style of Earl of the said place. And to the end that the same Earl and his heirs, according to the worthiness of such great name and honour, might be able the more honourably and better to support the burdens incumbent on them by the letters aforesaid, he gave and granted and by the same confirmed to the same Earl and his heirs twenty pounds of rent out of the issues of the County of Wilts every year at the feasts of Easter and Saint Michael the Archangel by equal portions, to be received by the hands of the Sheriff of that County who for the time should be, for ever, as in the Letters aforesaid it is more fully contained. Which same rent among other things was forfeited and wholly determined and extinct by the judgment rendered against John, late Earl of Salisbury, by authority of the Parliament holden in the second year of the reign of the Lord Henry, late King of England, our grandfather, because of high treason committed by the same John against our same grandfather. Which same judgment afterwards was confirmed and declared good by the authority of divers Parliaments, as well in the time of our said grandfather as in the time of Henry, late King of England, our father. And that by authority of the Parliament holden in the ninth year of our said father, it was ordered, among other things, that Thomas, son of the aforesaid John [should be enabled], among other things, to be heir of the blood, and to have the name and ability of heir, [and] the honour, estate and dignity of the said John, and to the same John, late Earl of Salisbury, and to have all manner of advantages as heir to the same John, late Earl, and to whomsoever of the ancestors of the said Thomas, and that the same Thomas and his heirs should be heritable as heirs as well to the said John, late Earl, as to whatsoever other ancestor of the said Thomas, as in the records of the same Parliament can more fully appear. And that our very dear Cousin Richard, now Earl of Salisbury, who took to wife Alesia, daughter and heir of the aforesaid Thomas, late Earl, and kinswoman and heir of the aforesaid William and John, still surviving, and had and has issue with the same Alesia at the time of the death of the said Thomas, at present surviving, and by that pretext and by reason of the said letters patent and the aforesaid ordinance in the said ninth year, the same Richard, now Earl, has had, supported and maintained the name, estate and honour of Earl of Salisbury from the time of the death of the said Thomas until now, as well in our presence as in our Parliaments and Councils and elsewhere, and at present has, supports and maintains, and for term of his life of right by pretext of the premises ought to have, support, and maintain as fully and entirely and with such pre-eminence which and as the

said William, late Earl, ought to have or maintain if he were surviving, and we have accepted, do accept, and have reputed the same Richard, Earl of Salisbury, with such pre-eminence, from the time of the death of the said Thomas until now, [and] do declare and accept the same Richard so to be, and duly to be, for term of his life by these presents, any of the premises or any other matter whatsoever notwithstanding. We, earnestly considering not only the premises, but also that the same now Earl has nothing from us or from any of our progenitors for the support of such name, estate and honour, of our special grace and of our mere motion, and also of our certain knowledge, have given and granted to the same Richard twenty pounds of rent by the year to support the name and estate of Earl of Salisbury, and to the aforesaid Alesia to have and receive to the same now Earl and Alesia, and the heirs of the same Alesia, out of the issues and profits of the County of Wilts arising every year at the Feasts of Easter and Saint Michael the Archangel, by equal portions by the hands of the Sheriff of that County for the time being. Moreover, we have granted and confirmed to the said Richard, Earl of Salisbury, and his heirs, who shall be, or ought to be, heirs of the aforesaid Alesia, such name, estate, honour, dignity and pre-eminence of Earl of Salisbury, as well in the presence of us and our heirs as in the Parliaments and Councils of us and our heirs and elsewhere as the said William, late Earl of Salisbury, ought to have if he were surviving, any gift or grant made by us to the said Richard, now Earl of Salisbury, and although express mention thereof is not made in these presents, or although we are not informed thereof, or any judgment, affirmation or declaration rendered or made against the same John, late Earl, by the authority of Parliament or otherwise, or any forfeiture of the same John, any inquisition, cause or matter heretofore taken, made or had, any omission or repugnance or any statute or ordinance made notwithstanding. In witness whereof, &c. Witness the King at Westminster, the fourth day of May.

(See *supra*, pp. 113, 133.)

Creation of John, Earl of Shrewsbury, as Earl of Waterford—Letters Patent, R. C. V. 251.

No. 49.
24 Hen. VI.
1446.

The King to all to whom, &c., greeting. Know ye that whereas we are bound to make satisfaction to those who have spent all the years of their youth in our services, and much more are we bound to reward those who have obediently and liberally expended not only years but their very bodies, often bloody with wounds, in the wars of our very

dear Lord and father and in our own, with no small sweat of labour, until their old age, according to their merits: We therefore, weighing with due consideration the assiduous probity of our very dear and trusty Cousin John, Earl of Shrewsbury and of Weysford*, and Lord * Wexford. Talbot of Furnyvall and le Siraunge, sufficiently proved until his old age in the wars aforesaid in body not only sweating but oftentimes red with shedding of blood, and understanding that our County and City of Waterford in our land of Ireland, the Castle, Lordship, Honor, Land and Barony of Dungarvan, and all lordships, lands, honors and baronies within the same County which, by the rebellion, forfeiture, reversion or decease of any person or persons, by escheat, or by any other title of right, ought to come to our hands or to those of our progenitors, or to be in the same, by hostile invasions of our enemies and rebels in those parts are so desolated and so greatly subject to the spoils of war as to be wholly devastated, that they have often redounded and do redound not to our profit but to loss, and also for that our aforesaid land of Ireland in those parts is most powerfully defended by our same Cousin against the assaults of such our enemies and rebels, do ordain, prefer and create him as Earl of Waterford, together with the style and title and name and honour due to the same. And because with increasing highness of estate burdens also necessarily increase, of our special grace and of our certain knowledge and mere motion, and for the more worthy maintenance of the estate of the same Earl our Cousin in future, we have given, granted and by these our letters have confirmed to the same Earl the County aforesaid, together with the aforesaid style, title, name and honour of Earl of Waterford, and the aforesaid City with the fee-farm of the same, the Castles, Lordships, Honours, lands and Baronies with the appurtenances within that County, and also all and all manner of our Manors, Hundreds, Wapentakes (&c.) . . . To have and to hold the aforesaid County of Waterford, style, title, name and honour of Earl of Waterford, and the aforesaid City of Waterford, Castle, Lordship, Honor (&c.) . . . to the aforesaid Earl and the heirs male of his body issuing of us and our heirs by homage, fealty (&c.) . . .

Creation of Sir John Beauchamp as Baron Beauchamp of Powyk—Letters Patent, R. C. V. 256.

The King to all to whom, &c., greeting. Know ye that whereas it is consonant and worthy of princes to erect the noblemen attending to their services, according to the requirement of their merits, to more worthy estates, and the Royal honour is extolled the more noblemen

No. 50.

25 Hen. VI.
1447.

there are under them elevated in estate and pre-eminence: hence it is that we, considering the probity and ancient renown of race of our beloved and trusty Knight, John Beauchampe, and also the laudable services which the same John has rendered as well to our very dear father deceased as to us, and daily does not cease to render to us, do erect and prefer the same John as Baron and Lord Beauchampe of Poywyke, as his merits require, and do give and grant to him all and all manner of style, name, dignity, seat, prerogative and pre-eminences to the estate of Baron in any manner appertaining: To have all such style, name, dignity, seat, prerogative and pre-eminences to the same John and to the heirs male of his body issuing. And we will and do grant that the same John Beauchampe shall be named and called Lord, and his heirs aforesaid shall be named and called Lord Beauchampe of Poywyke. And because burdens are annexed to honours, of our special grace and of our certain knowledge and mere motion, and to the end that the same John and his heirs aforesaid may the more easily and honourably be able to support the burdens incumbent on the estate aforesaid, we have granted to the same John sixty pounds out of the fee-farm of our Town of Gloucester yearly to be received by the hands of the Burgesses of our Town aforesaid who for the time shall be, and twelve pounds (&c.) . . . Although express mention (&c.) . . . Witness the King, at Westminster, the 2nd day of May.

By writ of Privy Seal, and of the date aforesaid, by authority of Parliament.

**Creation of John Stourton as Baron Stourton—
Letters Patent, R. C. V. 264.**

No. 51.
26 Hen. VI.
1448.

The King to all to whom, &c., greeting. Whereas it is consonant and worthy of princes to erect the noblemen attending to their services, according to the requirements of their merits, to more worthy estates, and the Royal honour is extolled the more noblemen there are under them elevated in estate and pre-eminence: hence it is that we, considering the probity and ancient renown of race of our beloved and trusty Knight John Stourton, and also the laudable services which the same John has rendered as well to our very dear father deceased as to us, and daily does not cease to render to us, do erect and prefer the same John as Baron and Lord Stourton of Stourton, as his merits require, and do give and grant to him all and all manner of style, name, dignity, seat, prerogative and pre-eminences to the estate of Baron in any manner appertaining. To have all such style, name,

dignity, seat, prerogative and pre-eminences to the same John Stourton and to the heirs male of his body issuing. And we will and do grant that the same John Stourton shall be named and called Lord and his heirs aforesaid shall be named and called Lord Stourton of Stourton. And because burdens are annexed to honours, of our special grace and of our certain knowledge and mere motion, and to the end that the same John and his heirs aforesaid may the more easily and honourably be able to support the burdens incumbent on the estate aforesaid, we have granted to the same John Stourton all our lands, tenements, pastures and wood, with the appurtenances within our Forest of Groveley, in the County of Wilts.

Confirmation of Earldom of Warwick to Richard and Anne Neville—Letters Patent, R. C. V. 272.

Henry, by the grace of God, King, &c., to all to whom these presents shall come, greeting. Whereas our very dear cousin Henry, late Duke of Warwick, deceased, brother of Anne, wife of our very beloved cousin Richard Neville, Knight, eldest son of our very dear cousin Richard Neville, Earl of Salisbury, of which same Henry she is heir, was Earl of Warwick, and the same Henry and his ancestors from the time whereof the memory of man is not to the contrary were Earls of Warwick, we heartily surveying the premises and the gratuitous and laudable services in many ways rendered by the aforesaid Richard, the son, as well about our person and otherwise as in Scotland upon the punishment of our adversaries and enemies there at his own charges and with no small labour of his body while he was still in his minority, and considering the probity, valour and circumspect prudence to shine and flourish in his person, and moreover hoping that the addition of honour will add great increase as well to his probity as to his valour aforesaid with us of our special grace of our mere motion and certain knowledge we confirm, ratify and declare the estate, name, title, honour and dignity of Earl of Warwick to be had to the aforesaid Richard, the son of Anne, and the heirs of the same Anne, and we grant them by the same present to the same Richard and Anne and the heirs of the same Anne with as many and great and such pre-eminences, dignities and honours as well in the presence of us, our heirs, and successors as in the absence of us and our heirs and successors wheresoever as and which the said Henry and any of his ancestors Earls of Warwick by any right and title as Earl of Warwick or otherwise before the said Henry was created and appointed as Duke ever had or exercised, or ought to have had or exercised, in any

No. 52.

**27 Hen. VI.
1449.**

manner although the aforesaid Richard, the son of Anne, may not at present have issue between them, although express mention of each of the premises is not made here or any statute, ordinance, act, appointment, thing or matter whatsoever made or enacted for any gift or grant made by us to the said Richard, the son of Anne, or either of them, or to any ancestor of either of them or that we are not informed thereof at present notwithstanding.

In witness, &c.

(See R. C. third Report, 158, and *supra*, p. 134.)

Creation of Thomas Percy as Baron Egremont—Letters Patent, R. C. V. 272.

No. 53.
28 Hen. VI.
1449.

The King to all to whom, &c., greeting. Know ye that we intimately considering the great and gratuitous services, honours, and labours which our beloved and trusty Thomas Percy, Knight, has in many ways rendered and daily does not cease to render to us of our special grace and of our certain knowledge and mere motion have erected, do prefer, and create the aforesaid Thomas as Baron of our Realm of England by the tenour of these presents, and do impose, give, and grant and have assigned to the same Thomas the name, style, title, and honour of Baron Egremont, which same Lordship of Egremont is within the County of Cumberland; to have the same name, style, and honour to him and his heirs male for ever. Further willing and granting to the same Thomas that he shall have and bear the name of Baron Egremont, and shall be called and named Baron Egremont, and his heirs aforesaid shall be called and named as Barons Egremont aforesaid. And the same Thomas and his heirs aforesaid shall be held, treated, and reputed and each of them shall be held, treated, and reputed as Barons of our same Realm in all things, and they shall have, hold, and possess their seat and place in Parliaments and Councils, and also in the Royal presences within our said Realm of England among other Barons of our same Realm. And also they shall enjoy and use all and singular pre-eminences, liberties, privileges, and immunities wheresoever within our same Realm and elsewhere as fully and entirely and in the same manner and form as other Barons of our said Realm and elsewhere before these times have best most honourably and quietly used and enjoyed or at present enjoy and use any estate or feoffment by the aforesaid Thomas, or any of his heirs of the said Lordship of Egremont, or of any parcel thereof to the use of any of them in any manner to be made notwithstanding. And

further we considering that the aforesaid Thomas and his heirs aforesaid and each of them may be able the more worthily and honourably to maintain and support such their estate, we have granted to the same Thomas ten pounds to be received every year to him and such his heirs male for ever out of the issues, profits, farms, and reversions arising from the aforesaid County of Cumberland by the hands of the Sheriff of the same County for the time being at the terms of Easter and Saint Michael by equal portions. Although express mention of other gifts and grants made by us to the aforesaid Thomas before these times is not made in these presents notwithstanding, and this without fine or fee whatsoever for these our present Letters or the seal or sealing of the same in anywise to be paid to us. In witness whereof, &c. Witness the King at Westminster the 20th day of November.

By Writ of Privy Seal and of the date aforesaid, &c.

Creation of the King's Son as Prince of Wales and Earl of Chester—R. C. V. 294.

Henry, by the grace of God, King of England, &c. To all Archbishops, Bishops, &c., greeting. Out of the excellency of Royal pre-eminence, like as the beams from the sun, so doth inferior honour proceed; neither doth the integrity of Royal lustre and brightness by the natural disposition of the light-affording light feel any loss or detriment by such borrowed lights; yea, the Royal sceptre is also much the more extolled, and the Royal throne exalted, by how much more noblesse, pre-eminences, and honours, are under the power and command thereof.

No. 54.
32 Hen. VI.
1453-4.

And this worthy consideration allureth and induceth us with desire to the increase of the name and honour of our first begotten and best beloved son, Edward, in whom we behold and see ourselves to be honoured, and our Royal House also, and our people subject to us, hoping by the grace of God (by conjecture taken, of his gracious future proceedings) to be the more honourably strengthened, that we may with honour prevent, and with abundant grace prosecute him, who in reputation of us is deemed the same person with us.

Wherefore by the counsel and consent of the Prelates, Dukes, Earls, Viscounts, and Barons of our Kingdom, being in our present Parliament, we have made and created, and by these presents make and create him the said Edward, Prince of Wales and Earl of Chester, and to the same Edward we give and grant and by this Charter have confirmed the name, style, title, state, dignity, and the honour of the said Principality, that he may therein in governing, rule, and in

ruling, direct and defend : We by a garland upon his head, by a ring of gold upon his finger, and a wand of gold have according to the manner invested him, to have and to hold to him, and to his heirs Kings of England for ever.

Wherefore we will and directly command, for us and our heirs, that Edward our son aforesaid, shall have the name, style, title, state, dignity, and honour of the Principality of Wales and of the County of Chester aforesaid, unto him and his heirs, the Kings of England aforesaid for ever ; These being witnesses, &c. Dated at our palace at Westminster the fifteenth day of March, and in the year of our reign thirty-two.

**Creation of the King's brother Duke of Clarence (who has married the eldest daughter of the last Earl of Warwick and Salisbury) as Earl of Salisbury—
R. C. V. 390.**

No. 55. Edward, &c., to Archbishops, &c., greeting. Know ye that whereas
 12 Edw. IV. our very dear brother George, Duke of Clarence, has taken to wife
 1471—2. Isabella, the elder daughter of Richard, late Earl of Warwick and Salisbury. We by that pretext and for certain other considerations specially moving us of our special grace and of our certain knowledge and mere motion, have given and granted, and by these presents do give and grant to our aforesaid brother the Duke of Clarence the name, style, title and honour of Earl of Salisbury. To have and to hold that name, style, title and honour to our aforesaid brother the Duke of Clarence and the heirs of his body lawfully issuing, with all and singular rights, privileges, immunities and pre-eminences to the same name, style, title and honour in any manner appertaining. And that our same brother, the Duke of Clarence and his heirs aforesaid shall have and hold the aforesaid name, style, title and honour of Earl of Salisbury as it is aforesaid, and henceforth our same brother the Duke of Clarence and his heirs aforesaid shall be called and named by the name of Earl of Salisbury for ever. And further of our more abundant grace we have granted to our same brother, the Duke of Clarence, for the support of the name and honour aforesaid twenty pounds, to be had and received yearly to him and his heirs aforesaid out of the issues, profits and revenues of the County of Wilts by the hands of the Sheriff of the same County for the time being at the terms of St. Michael and Easter by equal portions. Although express mention of other gifts or grants made to our same brother, the Duke of Clarence, by us before these times is not made in these presents,

or any statute, act, or ordinance to the contrary thereof made, enacted, or provided notwithstanding. These being witnesses : [&c.] . . .

Given by our hand at our Palace of Westminster on the 25th day of March.

By the King himself, and of the date, &c.

(See R. C. third Report, 219.)

Creation of Edward Courtenay as Earl of Devon— Letters Patent.

Mary, by the grace of God, &c. to archbishops, bishops, &c. greeting.
[Preamble] of our special grace and certain knowledge and mere motive have erected, preferred and created the said Edward as Earl of Devon, and by these presents erect, prefer and create to him the name, status, style, title, honour and dignity of Earl of Devon, with all and singular the preëminences, honours and other things whatsoever of such status of Earl of Devon appertaining, we give and concede by these presents to him, the said Edward, of the same style, title, honour and dignity by the girding of a sword we have marked, invested and really ennobled, and a cap of honour and dignity, also a circle of gold on his head we place, to have and to hold the name, status, style, title, honour and dignity of Earl of Devon aforesaid, with all and singular the preëminences, honours and other things aforesaid to the said Edward and his heirs male for ever [and then follows a grant of 20*l.* per annum] to him and his heirs aforesaid of the small customs of our Port of London by the hand of the collectors for the time being in equal portions, so that express mention, &c. These being witnesses, &c.

No. 56.

1 Mary, 1553.

Creation of Thomas, Earl of Arundel and Surrey, as Earl of Norfolk—Letters Patent.

Charles, by the grace of God, King of England, &c. to archbishops, dukes, &c. greeting. Know ye that we seriously contemplating the eminent services and merits of the noble progeny of Thomas Howard, late Duke of Norfolk, and judging the same to be most worthy that in reward of their virtues and in perpetual testimony of our royal favour we should grant to it the honour of Earl of Norfolk as being descended from Thomas de Brotherton, formerly Earl of Norfolk, younger son of Edward the First, famous King of England, by Margaret, daughter of

No. 57.

20 Car. I.
1644.

Philip the Third, King of France, of our special grace and of our certain knowledge and mere motion have erected, preferred, honoured, constituted and created Thomas, Earl of Arundel and Surrey, only son of the late Earl of Arundel and Surrey, eldest son of the said late Duke of Norfolk as Earl of Norfolk, and also to the estate, degree, style, title, dignity, name and honour of Earl of Norfolk. And by the tenour of these presents we do erect, confer, honour, constitute and create the same Thomas, Earl of Arundel and Surrey, as Earl of Norfolk, and also to the estate, degree, style, title, dignity, name and honour of Earl of Norfolk. Then follow the usual provisions.

**Creation of Field-Marshal the Marquis of Wellington
to be Marquis of Douro and Duke of Wellington.**

No. 58.

54 Geo. III.
1814.

George the Third, by the grace of God, &c. to all archbishops, &c. Know ye that we of our especial grace, certain knowledge and mere motion, have advanced, preferred and created our right trusty and entirely beloved cousin and councillor Field-Marshal Arthur, Marquis of Wellington, in our county of Somerset, Knight of the Most Noble Order of the Garter, to be Marquis Douro [here follow usual clauses]. And moreover it being our will and pleasure to dignify the said Arthur, Marquis of Wellington, with the title of Duke, and to admit him amongst the Dukes of our United Kingdom of Great Britain and Ireland of our more abundant especial grace and of our certain knowledge and mere motion, We have advanced, preferred, dignified, constituted and created the said Arthur, Marquis of Wellington, Duke of Wellington, in our county of Somerset. Also to the state, degree, style, title, dignity, name and honour of Duke of Wellington aforesaid. And him the said Arthur, Marquis of Wellington, Duke of Wellington, in our county of Somerset, Do by these presents advance, prefer, dignify, constitute and create, And we have appointed, given and granted and by these presents for us, our heirs and successors, Do appoint, give and grant unto him, the said Arthur, Marquis of Wellington, the name, state, degree, style, dignity, title and honour of Duke of Wellington aforesaid. And him the said Arthur, Marquis of Wellington, by these presents we do dignify, invest and really ennoble with such name, style, title, state, degree, dignity and honour of Duke of Wellington, in our county of Somerset, by girding him with a sword and putting a cap of honour and a coronet of gold on his head and by giving into his hand a rod of gold. To have and to hold the name, state, degree, style, dignity and honour of Duke of Wellington aforesaid, with all and singular pre-eminences and other

honours belonging or appertaining to such name, style, title, state, degree, dignity and honour of Duke of Wellington aforesaid unto him the said Arthur, Marquis of Wellington, and the heirs male of his body lawfully begotten and to be begotten for ever. And further we will and by these presents for us, our heirs and successors, Do give and grant unto the said Arthur, Marquis of Wellington, and his heirs male aforesaid, that he and his heirs male aforesaid, and every of them successively may bear and have the name, style, title, state, degree, dignity and honour of Duke of Wellington, and that they and every of them successively may be called and styled by the name of Duke of Wellington. And that he, the said Arthur, Marquis of Wellington, and his heirs male aforesaid, and every one of them successively, may be held and deemed Dukes of Wellington, and be treated and reputed as dukes, and that they and every of them successively may have, hold and possess a seat, place and voice in the Parliaments of us, our heirs and successors, within our United Kingdom of Great Britain and Ireland amongst other nobles and peers of this our United Kingdom of Great Britain and Ireland as Dukes of Wellington, and also that the said Arthur, Marquis of Wellington, and his heirs male aforesaid may enjoy and use, and every of them successively may enjoy and use by the name of Duke of Wellington aforesaid, All and singular the rights, privileges, pre-eminences, immunities and advantages to the state of a duke in all things duly and of right belonging which other dukes of this our United Kingdom of Great Britain and Ireland have heretofore honourably and quietly used and enjoyed or as they do at present use and enjoy. And further we will and by these presents for us, our heirs and successors of our more ample grace Do grant unto the said Arthur, Marquis of Wellington, and his heirs male aforesaid, that these our letters patent or the enrolment thereof shall be sufficient and effectual in the law for the dignifying, investing and really ennobling him, the said Arthur, Marquis of Wellington, and his heirs male aforesaid, with the several and respective names, titles, dignities and honours of Marquis Douro and Duke of Wellington, in our county of Somerset, and this without any investiture, rites, ornaments or ceremonies whatsoever in this behalf due and accustomed which, for some certain reasons best known to us, we could not in due manner do and perform any ordinance, use, custom, rite, ceremony, prescription or provision due or used, or to be had, done or performed in conferring honours of this kind or any other matter or thing to the contrary thereof in any wise notwithstanding. We will also, &c. without fine in our Hanaper, &c. In witness whereof we have caused these our letters to be made patent. Witness, &c.

Creation of Field-Marshal Lord Roberts as Viscount St. Pierre and Earl Roberts, with remainders over.

No. 59.
 1 Edw. VII.
 1901.

Edward the Seventh, by the grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, to, &c., greeting. Know ye that We of Our especial Grace, certain knowledge and mere motion have advanced, preferred and created Our right trusty and well beloved Frederick Sleigh Baron Roberts of Kandahar, Knight of Our Most Noble Order of the Garter, Knight of Our Most Illustrious Order of Saint Patrick, Knight Grand Cross of Our Most Honourable Order of the Bath, Knight Grand Cross of Our Most Exalted Order of the Star of India, Knight Grand Cross of Our Most Eminent Order of the Indian Empire, upon whom Her late Majesty conferred the decoration of the Victoria Cross, Field-Marshal and Commander-in-Chief of Our Forces, lately Field-Marshal Commanding-in-Chief the Forces in South Africa to be Viscount St. Pierre [*in tail male, with remainders over like the earldom below*]. And moreover it being Our will and pleasure to further dignify the said Frederick Sleigh Baron Roberts with the title of Earl, hereinafter set forth of Our more abundant especial grace and of Our certain knowledge and mere motion, We have advanced, preferred and created the said Frederick Sleigh Baron Roberts to the state, degree, style, title, dignity and honour of Earl Roberts of Kandahar in Afghanistan, and Pretoria in the Transvaal Colony, and of the City of Waterford, and him the said Frederick Sleigh Baron Roberts, Earl Roberts of Kandahar, Pretoria and Waterford aforesaid, We do by these presents create, advance and prefer. And We have appointed, given and granted, and by these presents for Us, Our heirs and successors, Do appoint, give, and grant unto him the said Frederick Sleigh Baron Roberts the name, state, degree, style, dignity, title and honour of Earl Roberts of Kandahar, Pretoria and Waterford, and him the said Frederick Sleigh Baron Roberts by these presents We do dignify, invest, and really ennoble with the name, style, title, state, degree, dignity and honour of Earl Roberts of Kandahar, Pretoria and Waterford, by girding him with a sword and putting a cap of honour and a coronet of gold on his head. To have and to hold the said name, state, degree, style, dignity, title and honour of Earl Roberts, with all and singular pre-eminences and other honours belonging or appertaining unto him the said Frederick Sleigh Baron Roberts, and the heirs male of his body lawfully begotten and to be begotten. And further we will and by these presents for Us, Our heirs and successors, Do give and grant unto the said Frederick Sleigh Baron Roberts and his heirs male, that he and his heirs male aforesaid, and every of them successively may

bear and have the name, style, title, state, degree, dignity and honour of Earl Roberts of Kandahar, Pretoria and Waterford, together with all and singular the rights, privileges, pre-eminences, immunities and advantages to the state of an Earl in all things duly and of right belonging. And that they and every of them successively may have, hold and possess a seat, place and voice in the Parliaments and Public Assemblies and Councils of Us, Our heirs and successors, within Our said United Kingdom, amongst other Nobles and Peers of this Our said United Kingdom as Earls Roberts, and in default of such issue, and after the decease of the said Frederick Sleigh Baron Roberts, To have and to hold the name, style, title, state, degree, dignity and honour of Countess Roberts of Kandahar in Afghanistan, Pretoria in the Transvaal Colony, and of the City of Waterford, unto the said Aileen Mary Roberts, and after the decease of the said Aileen Mary Roberts, To have and to hold the name, style, title, state, degree, dignity and honour of Earl Roberts of Kandahar, Pretoria and Waterford unto the heirs male of her body lawfully begotten and to be begotten. And further, We will and for Us, Our heirs and successors, do give and grant that the said Aileen Mary Roberts may bear and have the name, style, title, state, degree, dignity and honour of Countess Roberts, together with all and singular the rights, privileges, pre-eminences, immunities and advantages to the degree of a Countess in all things duly and of right belonging, and that after the decease of the said Aileen Mary Roberts the heirs male of her body and every of them successively may bear and have the name, style, title, state, degree, dignity and honour of Earl Roberts of Kandahar, Pretoria and Waterford, together with all and singular the rights, privileges, pre-eminences, immunities and advantages to the state of an Earl in all things duly and of right belonging. And that every of them successively may have, hold and possess a seat, place and voice in the Parliaments and Public Assemblies and Councils of Us, Our heirs and successors, within Our United Kingdom of Great Britain and Ireland amongst other Peers and Nobles of Our said United Kingdom as Earls Roberts, and in default of such issue, and after the decease of the said Aileen Mary Roberts, To have and to hold the name, style, title, state, degree, dignity and honour of Countess Roberts of Kandahar in Afghanistan, and Pretoria in the Transvaal Colony, and of the City of Waterford unto the said Ada Edwina Stewart Roberts, and after the decease of the said Ada Edwina Stewart Roberts, To have and to hold the name, style, title, state, degree, dignity and honour of Earl Roberts unto the heirs male of her body lawfully begotten and to be begotten. And further, we will and for Us, Our heirs and successors, do give and grant that the said Ada Edwina Stewart Roberts may bear and have the name, style, title, state,

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degree, dignity and honour of Countess Roberts, together with all and singular the rights, privileges, pre-eminences, immunities and advantages to the degree of a Countess in all things duly and of right belonging, and that after the decease of the said Ada Edwina Stewart Roberts the heirs male of her body and every of them successively may bear and have the name, style, title, state, degree, dignity and honour of Earl Roberts of Kandahar, Pretoria and Waterford, together with all and singular the rights, privileges, pre-eminences, immunities and advantages to the state of an Earl in all things duly and of right belonging, and that they and every of them successively may have, hold and possess a seat, place and voice in the Parliaments and Public Assemblies and Councils of Us, Our heirs and successors, within Our United Kingdom of Great Britain and Ireland amongst other Nobles and Peers of Our said United Kingdom as Earls Roberts, and in default of such issue, and after the decease of the said Ada Edwina Stewart Roberts, To have and to hold the name, style, title, state, degree, dignity and honour of Countess Roberts of Kandahar in Afghanistan, and Pretoria in the Transvaal Colony, and of the City of Waterford unto each other younger daughter lawfully begotten of the said Frederick Sleigh Baron Roberts successively in order of seniority of age and priority of birth, and unto the heirs male of their bodies lawfully begotten. Lastly, We will and by these presents for Us, Our heirs and successors, do grant to the said Frederick Sleigh Baron Roberts, that these Our Letters Patent, or the Enrolment thereof, shall be sufficient and effectual in the Law for the dignifying, investing, and really ennobling him, the said Frederick Sleigh Baron Roberts and the heirs male of his body aforesaid, Together with the several persons hereinbefore specified, with the respective names, titles, dignities and honour aforesaid, and this without any investiture, rites, ornaments, or ceremonies whatsoever due and accustomed, which for some certain reasons best known to Us, we could not in due manner do and perform any Ordinance, use, custom, rite, ceremony, prescription or provision due, or used, or to be had, done, or performed in conferring honours of this kind, or any other matter or thing to the contrary thereof notwithstanding.

In witness whereof we have caused these our letters to be made patent.

Witness, &c.

Creation of the Right Honourable William James Pirrie as Baron Pirrie of the City of Belfast (Tail Male.

Edward the Seventh by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith. To all Archbishops, Dukes, Marquesses, &c., to whom these Presents shall come, Greeting. Know ye that We of Our especial grace, certain knowledge, and mere motion Have advanced, preferred, and created Our Right trusty and well-beloved Councillor William James Pirrie to the state, degree, dignity, and honour of Baron Pirrie of Our City of Belfast, and him the said William James Pirrie, Baron Pirrie of Our City of Belfast aforesaid Do by these Presents advance, create, and prefer. And We have appointed, given, and granted, and by these Presents for Us, Our heirs and successors Do appoint, give, and grant unto him the said William James Pirrie the name, state, degree, style, dignity, title, and honour of Baron Pirrie of Our City of Belfast aforesaid, To have and to hold the said name, state, degree, style, dignity, title, and honour of Baron Pirrie of Our City of Belfast aforesaid, unto him the said William James Pirrie and the heirs male of his body, lawfully begotten and to be begotten, Willing and by these Presents granting for Us, Our heirs and successors, that the said William James Pirrie and his heirs male aforesaid and every of them successively may bear and have the name, state, degree, style, dignity, title, and honour of Baron Pirrie of Our City of Belfast aforesaid. And that they and every of them successively may be called and styled by the name of Baron Pirrie of Our City of Belfast, and that he, the said William James Pirrie and his heirs male aforesaid and every of them successively may in all things be held and deemed Barons Pirrie of Our City of Belfast aforesaid, and be treated and reputed as Barons. And that they and every of them successively and respectively may have, hold, and possess a seat, place, and voice in the Parliaments and Public Assemblies and Councils of Us, Our heirs and successors, within Our United Kingdom of Great Britain and Ireland amongst other Barons as Barons of Parliament and Public Assemblies and Councils. And also that he the said William James Pirrie and his heirs male aforesaid may enjoy and use and every of them successively may enjoy and use, by the name of Baron Pirrie of Our City of Belfast aforesaid, all and singular the rights, privileges, pre-eminences, immunities, and advantages to the degree of a Baron in all things duly and of right belonging, which other Barons of this Our United Kingdom of Great Britain and Ireland have heretofore honourably

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1906.

and quietly used and enjoyed or as they do at present use and enjoy. Lastly, We will and by these Presents for Us, Our heirs and successors, Do grant to the said William James Pirrie that those Our Letters Patent or the Inrolment thereof shall be sufficient and effectual in the Law for the dignifying, investing, and really ennobling him, the said William James Pirrie and his heirs male aforesaid, with the name, title, dignity, and honour of Baron Pirrie of Our City of Belfast aforesaid, and this without any investiture, rites, ornaments, or ceremonies whatsoever in this behalf due and accustomed which for some certain reasons best known to Us We could not in due manner do and perform, any ordinance, use, custom, rite, ceremony, prescription, or provision due or used or to be had, done, or performed in conferring honours of this kind or any other matter or thing to the contrary thereof notwithstanding.

In witness whereof we have caused these Our Letters to be under Patent.

Witness Ourselves at Westminster.

NOTE.

ORIGIN OF THE COURT OF THE LORD HIGH STEWARD (see *supra*, p. 147).

Origin of
Court of High
Steward.

There is a difference of opinion as to when the Court of the Lord High Steward originated. The Year-Book, Michaelmas Term, 1 Hen. IV., reports a case in which a peer, "the Earl of H.," was tried in the Court of the Lord High Steward, and describes the procedure in considerable detail. Doubts have of late years been raised as to whether the reported trial really took place, but after investigation Mr. Pike in his "Constitutional History of the House of Lords," comes to the conclusion (p. 213) that "It is impossible to believe that the report in the Year-Book, confirmed as it is by contemporary evidence, was a pure invention." On the other hand Mr. Vernon Harcourt, in his book intituled "His Grace the Steward and Trial of Peers," comes to the conclusion that the report was forged, and that there never was any such trial (p. 429). Which is the correct conclusion is not material for the purposes of this work. It is sufficient that for centuries the Court of the Lord High Steward has been a recognized part of the Constitution. (See 4 Inst. 58; 2 Hawk. V. C. V. 421; Blackstone 1, V. 258.)

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